



Land and Environment Court New South Wales

Case Title: Friends of Turramurra Inc v Minister for Planning

Medium Neutral Citation: [2011] NSWLEC 128

Hearing Date(s): 29 – 30 November 2010
1- 2 December 2010
7 December 2010

Decision Date: 28 July 2011

Jurisdiction: Class 4

Before: Craig J

Decision:

1. Declare that Ku-ring-gai Local Environmental Plan (Town Centres) 2010 published on the NSW legislation website on 25 May 2010 has been made contrary to the provisions of Division 4 of Part 3 of the *Environmental Planning and Assessment Act 1979* and is thereby of no legal force or effect.
2. Costs reserved.
3. Any application for costs is to be made by notice of motion filed within 7 days of today's date.
4. Exhibits may be returned.

Catchwords: ADMINISTRATIVE LAW – judicial review – challenge to the validity of Ku-ring-gai Local Environmental Plan (Town Centres) 2010 – delegation to planning Panel to issue certificate under s 65 of the Environmental Planning and Assessment Act 1979 ("EPA Act") – no certificate issued by Panel – no ~~invalidity attending absence of certificate~~ exhibition of draft instrument under s 66 of the EPA Act – diverse locations to view

documents in addition to the location of the "statutory exhibition" – misleading exhibition material – need to consider the "interested reader" of exhibition material – alteration by both the Panel and the Minister of the exhibited draft instrument following exhibition – draft planning instrument altered in important respects – aggregate affect of all alterations – not the product of the process for plan preparation required by Part 3, Division 4 of the EPA Act – consideration of cl 10 of State Environmental Planning Policy No 19 – Bushland in Urban Areas – substantive consideration of the requirements – validity of s 69 report prepared by Panel as delegate of the Director-General – impact of planning changes upon Council-owned land – Guidelines for Councils using delegated powers to prepare LEPs involving land owned or controlled by Council ("the Guidelines") – need for land to be classified as operational land before disclosure mandated by Guidelines – substantive alteration to draft instrument without re-exhibition of the altered draft – instrument of no legal force and effect

Legislation Cited:

Environmental Planning and Assessment Act 1979

Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005

Environmental Planning and Assessment Regulation 2000

Interpretation Act 1987

Environmental Planning and Assessment (Ku-ring-gai Planning Panel) Order 2008

Ku-ring-gai Local Environmental Plan (Town Centres) 2010

Local Government Act 1993

State Environmental Planning Policy No 1- Development Standards

State Environmental Planning Policy No 19
– Bushland in Urban Areas

State Environmental Planning Policy
(Infrastructure) 2007

State Environmental Planning Policy
(Exempt and Complying Development
Codes) 2008

Threatened Species Conservation Act 1995

Cases Cited:

Bryan v Lane Cove Council [2007] NSWLEC
586; (2007) 158 LGERA 390

Calleja v Botany Bay City Council [2005]
NSWCA 337; (2005) 142 LGERA 104

Cooper Brookes (Wollongong) Pty Ltd v
Federal Commissioner of Taxation [1981]
HCA 26; (1981) 147 CLR 297

Curac v Shoalhaven City Council (1993) 81
LGERA 124

El Cheikh v Hurstville Council [2002]
NSWCA 173; (2002) 121 LGERA 293

Gales Holdings Pty Ltd v Minister for
Infrastructure and Planning [2006] NSWCA
388; (2006) 69 NSWLR 156

Hatton v Beaumont [1977] 2 NSWLR 211

Hecar Investments No 6 Pty Ltd v Lake
Macquarie Municipal Council (1984) 53
LGRA 322

Minister for Immigration and Citizenship v
SZJGV [2009] HCA 40; (2009) 259 ALR 595

Homeworld Ballina Pty Ltd v Ballina Shire
Council [2010] NSWCA 65; (2010) 172
LGERA 211

John Brown Lenton & Co Pty Ltd v Minister
for Urban Affairs and Planning [1999]
NSWLEC 213; (1999) 106 LGERA 150

Ku-ring-gai Council v Minister for Planning
[2008] NSWLEC 174

Leichhardt Council v Minister for Planning
(No 2) (1995) 87 LGERA 78

Mikaelian v CSIRO [1999] FCA 610; (1999)
163 ALR 172

Project Blue Sky v Australian Broadcasting
Authority [1998] HCA 28; (1998) 194 CLR
355

Smith v Wyong Shire Council [2003]
NSWCA 322; (2003) 132 LGERA 148

Weal v Bathurst City Council [2000] NSWCA
88; (2000) 111 LGERA 181

Wehbe v Pittwater Council [2007] NSWLEC
827; (2007) 156 LGERA 446

Vanmeld Pty Ltd v Fairfield City Council
[1999] NSWCA 6; (1999) 46 NSWLR 78

Zhang v Canterbury City Council [2001]
NSWCA 167; (2001) 51 NSWLR 589

Category:	Principal judgment
Parties:	Friends of Turramurra Inc (Applicant) Minister For Planning (First Respondent) Ku-ring-gai Planning Panel (Second Respondent)
Representation	
- Counsel:	Mr P W Larkin (Applicant) Ms C E Adamson SC (Respondent)
- Solicitors:	Environmental Defender's Office (Applicant) Department of Planning (Respondent)
File number(s):	40672 of 2010

JUDGMENT

- 1 The attempts by central government to impose planning controls, allowing higher density development in parts of the Ku-ring-gai local government area, have been controversial in recent years. In 2004, a direction was given to Ku-ring-gai Council (**the Council**) on behalf of the Minister requiring it to prepare a draft local environmental plan in accordance with stated principles intended to achieve the objective of higher density development.

- 2 By early 2008 that direction had not, according to the Minister, been satisfactorily addressed. In an endeavour to end the controversy and more expeditiously achieve planning controls that reflected State government policy, a planning panel, assigned the corporate name "Ku-ring-gai Planning Panel" (**the Panel**), was appointed by the Minister to carry out nominated planning functions of the Council. This appointment occurred in March 2008. The Council's challenge to the validity of the Minister's action in so doing was unsuccessful (*Ku-ring-gai Council v Minister for Planning* [2008] NSWLEC 174).
- 3 Nonetheless, the controversy continues. On 25 May 2010, the Minister made *Ku-ring-gai Local Environmental Plan (Town Centres) 2010* (**the Centres LEP**). The Centres LEP was made consequent upon preparation by the Panel of the instrument in draft and submission by it to the Minister. It is the validity of the Centres LEP that is challenged in these proceedings.

- 4 Invalidity of the Centres LEP is claimed on six grounds. It is convenient to identify these grounds by summarising them in the order in which they appear in the applicant's amended points of claim. They are –
 - (i) no valid certificate was issued in accordance with s 65 of the *Environmental Planning and Assessment Act*

1979 (the EPA Act) enabling exhibition of the draft Centres LEP;

- (ii) the exhibition of the draft Centres LEP was "incomplete, invalid and misleading" and, as such, it did not conform to the requirements of s 66 of the EPA Act;
- (iii) substantial amendments were made by the Panel to the draft centres LEP following exhibition of the instrument but the draft instrument, as amended by the Panel, was not re-advertised before being made. In that circumstance, the Centres LEP was not the product of the processes ordained by Div 4 of Pt 3 of the EPA Act for the making of a local environmental plan;
- (iv) when preparing the draft Centres LEP, the Panel failed to consider cl 10 of *State Environmental Planning Policy No 19 – Bushland in Urban Areas (SEPP 19)*;
- (v) no valid report was furnished to the Minister as was required to be done by s 69 of the EPA Act; and
- (vi) substantial amendments were made by the Minister to the draft Centres LEP submitted to him by the Panel but the draft instrument, as amended by him, was not re-advertised before being made. In that circumstance, the Centres LEP was not the product of processes ordained by Div 4 of Pt 3 of the EPA Act for the making of a local environmental plan.

5 Some of these grounds are sought to be supported on alternate bases. Further, while grounds (i) and (v) have one basis of challenge in common, generally both the statutory provisions and facts relied upon to support each ground are different. This will necessitate separate consideration of

those statutory provisions and facts as each ground is considered.

However, it is appropriate to identify general background facts so that each ground of challenge can be considered in context.

Background

6 On 27 May 2004, the Minister Assisting the Minister for Planning gave a direction to the Council pursuant to s 55(1) of the EPA Act, as that section then stood. The direction required the Council –

“(a) to perform all of its functions under Division 4, Pt 3 of the Act, to prepare a draft local environmental plan for areas in close proximity to the railway line and Pacific Highway and the St Ives Centre which are zoned Residential “D”, “E”, “F” and “H” and 3(a) and 3(b) under Ku-ring-gai Planning Scheme Ordinance; ...”.

7 The Council was required by the direction to include in the draft instrument provisions that –

“encouraged the provision of housing that will broaden the choice of building types and locations available in the housing market and to make more efficient use of existing infrastructure and services.”

The direction further required that a principle to be implemented in preparing the draft local environmental plan was one to “revitalise the existing retail/commercial areas.”

8 Between July 2005 and May 2006, a number of resolutions were passed by the Council to prepare draft local environmental plans for each of the centres and surrounding lands at St Ives, Turramurra, Pymble, Gordon, Lindfield and Roseville. The Director-General was advised of the resolutions for preparation of these local environmental plans.

9 None of the draft local environmental plans prepared as a consequence of these resolutions had been made by early 2008. On 29 February 2008, exercising the power available to him under s 118(1)(b) of the EPA Act, the

Minister made the *Environmental Planning and Assessment (Ku-ring-gai Planning Panel) Order 2008 (the Order)*. The Order was published in the Gazette on 3 March 2008. By cl 4(1)(b) of the Order, the Panel was appointed to exercise all the functions of the Council –

- "(b) in relation to the making of environmental planning instruments under Pt 3 of the Act, but only in relation to:
 - (i) the control of dual occupancy, and
 - (ii) the control of development within the Ku-ring-gai Town Centres."

The "Town Centres" referred to in that clause were identified in the Order as the lands in and surrounding the six town centres that had been the subject of resolution by the Council to prepare draft local environmental plans.

- 10 By subclause (4) of cl 4 of the Order, the plan making function of the Panel was expressed to "extend to" the making of any plan "whose making commenced before the commencement of this Order." It is accepted by the applicant that as the Council had embarked upon the plan making process for each of the town centres to which I have earlier referred, the Panel was empowered by the Order to take up that exercise.
- 11 This the Panel did. On 12 March 2008, it resolved to consider a report from Council staff outlining options for "finalising" a draft instrument that had been submitted to the Department of Planning by the Council. It also resolved, as an alternative, to prepare a draft "comprehensive" local environmental plan for all the town centres. In addition, it resolved to advise the Department of Planning of its decision to prepare the draft comprehensive instrument.
- 12 However, on 11 June 2006 the Panel resolved that a single comprehensive "Town Centres Local Environmental Plan" be prepared for consideration by the Panel, the preparation of the draft to be undertaken by Council staff who provided administrative assistance to the Panel. At

its meeting held on 30 July 2008, the Panel resolved to endorse a time-table for preparation of the comprehensive draft local environmental plan, a time-table that included community consultation in the various centres as well as statutory exhibition of the draft instrument.

- 13 Meantime, the Regional Director of the Department of Planning had been notified pursuant to s 54(4) of the EPA Act of the decision of the Panel to prepare the draft comprehensive local environmental plan for the whole of the town centres area identified in the Order. The Department of Planning had also been consulted in the preparation of the time-table for preparation of the draft instrument (**the draft Centres LEP**), being the time-table adopted on 30 July.
- 14 The Director-General's response to notification pursuant to s 54(4) was, for present purposes, twofold. First, he determined that it was unnecessary to prepare an environmental study in respect of the draft Centres LEP (cf. s 74(2)(b) EPA Act). Second, on 12 August 2008 he signed a document entitled "Written Authorisation to Exercise Delegation" (**the Delegation**), delegating to the Panel his functions under ss 65(1) and 69(1) of the EPA Act with respect to the draft Centres LEP. It will be necessary to consider the terms of the Delegation in greater detail when considering grounds of challenge (i) and (v) earlier identified
- 15 On 5 November 2008 the chairperson of the Panel signed a certificate under s 65 of the EPA Act in respect of the draft Centres LEP. The validity of her action in so doing is the subject of challenge. On that same date the Panel met and resolved to adopt the draft instrument for exhibition in accordance with s 66 of the EPA Act.
- 16 The draft Centres LEP was, according to advertisements published in the North Shore Times Newspaper, on exhibition from 17 November until 19 December 2008. In addition to the advertisements published in that newspaper, form letters were sent on behalf of the Council to all residents of Ku-ring-gai advising of the preparation of the draft local environmental

plan, indicating the places where documents may be inspected and inviting submissions. In addition, a DVD containing "the key relevant exhibition material" was forwarded to each household within the boundaries of each town centre area. This material was provided to residents prior to commencement of the advertised exhibition period.

- 17 The draft Centres LEP was next considered by the Panel at its meeting on 27 May 2009. Members of the Panel had previously been circulated with a lengthy and detailed report, prepared by Council officers. That report identified and summarised more than 1800 submissions received in response to exhibition of the draft instrument, made observations concerning those submissions and recommended that amendments be made to the exhibited draft.
- 18 At that meeting, the Panel resolved to adopt the draft Centres LEP as amended in accordance with the recommendations made in the report presented to it. It also resolved that the draft instrument, as amended, be submitted to the Minister in accordance with s 69 of the EPA Act. Following the Panel's consideration of the draft instrument on that occasion, further amendments were made to it as a result of representations made by the Department of Planning and also following upon consideration of the draft by Parliamentary Counsel
- 19 Ultimately, the report prepared by the Panel pursuant to s 69, in accordance with the Delegation, recommending that the Centres LEP be made in accordance with the draft as amended to that date, was forwarded to the Minister on 9 December 2009. Subsequently, a supplementary report under s 69 was prepared by the Director-General of the Department of Planning recommending further amendment of the draft instrument and also recommending the making of the amended draft as a local environmental plan.
- 20 The Minister accepted the recommendation and ultimately made the Centres LEP in the form amended by the Panel and as further amended

by him in accordance with the recommendation of the Director-General. Neither public notice nor public exhibition of the draft instrument, as amended by the Panel or the Minister, was undertaken prior to its signing by the Minister and publication on the NSW legislation web site on 25 May 2010.

- 21 It is in the context of this overview of the background facts that the grounds of challenge to the validity of the Centres LEP must be considered. I now turn to consider each of these grounds.

Ground (i): validity of the s 65 certificate

- 22 As the provisions of the Act stood in November 2008, the step required to be taken before a draft local environmental plan could be publicly exhibited was the issue of a certificate by the Director-General, certifying that the exhibition process may be undertaken. The applicant contends that no valid certificate was issued in respect of the draft Centres LEP, the Director-General himself not having purported to do so, because –

- (i) the Director-General's delegation of his function under s 65 was to the Panel and, at no time, did the Panel resolve to issue a certificate under the section;
- (ii) the chair-person of the Panel, who signed a document purporting to be a certificate under the section, was not delegated by the Director-General to issue the certificate,
- (iii) the delegation to the panel was conditional upon compliance with the Best Practice Guidelines published by the Department of Urban Affairs and Planning in January 1997 (**the Guideline**) and that condition was not fulfilled.

23 By s 23 of the EPA Act, the Director-General was authorised to delegate his functions under the EPA Act. It was in exercise of this power that the Director-General signed the Delegation to which I have referred at [14]. Relevantly, the terms of the authorisation or Delegation were expressed as follows –

"This is a written authorisation to Exercise Delegation ('authorisation') pursuant to the instrument of Delegation executed by the Director-General of the Department of Planning ... on 16 February 2006 ('Delegation').

Subject to the Delegation and the terms and conditions specified in schedule 1 to this Authorisation, the following functions are delegated to Ku-ring-gai Planning Panel with respect to the draft local environmental plan the subject of notification by Council [sic] to the Director-General under section 54(4) of the *Environmental Planning and Assessment Act 1979* ('EP&A Act') dated 27 June 2008, being Draft Ku-ring-gai Local Environmental Plan (Town Centres).

- Sections 65(1)
- Sections 69(1)."

24 The Schedule identified in the Delegation was in the following terms:

"Schedule 1

The exercise of the function (s) under the Delegation is subject to:

1. the draft LEP being consistent with any relevant Ministerial Direction issued pursuant to section 117 of the EP&A Act; and
2. The draft LEP not being the subject of an unresolved objection by a public authority or body; and
3. the draft LEP not containing provisions suspending laws pursuant to Section 28 of the EP&A Act; and
4. compliance with the Best Practice Guidelines published by the Department of Urban Affairs and Planning in January 1997 entitled "*LEP and Council land – Guidelines for Councils using delegated powers to prepare LEPs involving land that is or was previously owned or controlled by Council*"; and
5. compliance with instructions issued by the Director-General with respect to the preparation and content of reports prepared pursuant to section 69 of the EP&A Act."

No issue is taken by the applicant as to the validity of the Delegation.

- 25 It is accepted by the Minister that the Director-General himself did not purport to issue a certificate under s 65 in respect of the draft Centres LEP. The only document that purports to be such a certificate is the document signed by the Chairperson of the Panel on 5 November 2008. It was in the following terms:

**"ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979
SECTION 65(2) CERTIFICATE**

As a delegate of the Director General of the Department of Planning under s 65(2) of the Environmental Planning and Assessment Act, 1979 I, Elizabeth Crouch, certify that the Draft Local Environmental Plan referred to in Schedule 1 may be publicly exhibited in accordance with section 88 of the Act."

Beneath the signature of the Chairperson the following appeared:

"As a delegate to [sic] the Director General of Planning and I certify that I have no notice of the revocation of such delegation".

- 26 The Schedule referred to in the certificate was as follows:

"Schedule 1

Draft Ku-ring-gai Local Environmental Plan (Town Centres) 2008.

To rezone lands within the area included in the Environmental Planning and Assessment Act (Ku-ring-gai Planning Panel) Order 2008 dated 29 February 2008."

- 27 Two matters will immediately be apparent from a comparison between the terms of the Delegation and the certificate signed by the Panel Chairperson. While the relevant function delegated to the Panel was expressed to be that arising under s 65(1), the certificate purports to be given pursuant to s 65(2). The second matter to be noticed is that the Chairperson, in her own name, purports to sign the document as the ~~delegate of the Director-General~~. As the Delegation makes clear, the Director-General's function is delegated to the Panel.

- 28 In relation to the latter of these two matters, the provisions of s 118AA of the EPA Act need to be noticed. This section addresses the constitution of a planning assessment panel appointed pursuant to s 118(1), as was the present Panel. Such a Panel is a Body Corporate (subsection (2)) and is a statutory body representing the Crown (subsection (3)). While subsection (6) requires the Minister to appoint a member of a panel as Chairperson, **none** of the other provisions of the section nor those contained in Pt 2 of Schedule 5B to the EPA Act (containing provisions relating to such panels) would appear to authorise the Chairperson to act in the name of, or exercise the authority of, a panel to whom that person is appointed.
- 29 It was accepted by the Minister that the two matters to which I have adverted in respect of the certificate signed on 5 November 2008 reflected an "irregularity in the making of the s 65 Certificate". Nonetheless, it was submitted that this "irregularity" did not spell invalidity for the Centres LEP. The bases for this submission will be addressed shortly. Before turning to consider the competing submissions it is necessary to record the events of 5 November 2008. A meeting of the Panel was appointed to take place on that day.
- 30 I have already indicated that secretarial or administrative services were provided to the Panel by Council staff. On 24 October 2008, four senior staff members signed a lengthy and detailed report addressing the draft Centres LEP that they had prepared in response to the Panel's resolution earlier in the year, recommending that the draft instrument for exhibition in accordance with s 66 of the EPA Act (**the October 2008 Report**). The draft Centres LEP was one of 17 attachments to that Report. That Report, together with attachments, was circulated to Panel members in advance of the meeting of 5 November.
- 31 Ms Crouch gave evidence in these proceedings. It appears that although the meeting of the Panel was appointed to commence at 5.00pm on 5 November 2008, earlier in the afternoon Panel members met with the Mayor, at least one Councillor and the four members of staff who had

prepared the October 2008 Report. Although Ms Crouch has no clear recollection of the timing, it is probable that in the course of these discussions, she signed the certificate that is the subject of the present submission. It is her recollection that the document was presented to her by one of the Council staff members who was present at that time.

32 I infer from the evidence of Ms Crouch that she signed the document without any challenge to the terms in which it was expressed. As her evidence makes abundantly clear, she relied upon the fact that the document was prepared for her by Council staff with the result that there was no necessity for her to question her action in signing it.

33 As I have said, it is probable that the Certificate was signed by Ms Crouch before commencement of the meeting on 5 November 2008. The evidence does not suggest that the issue of the certificate was the subject of consideration at the formal meeting of the Panel commencing at 5.00pm on 5 November. Certainly, the October 2008 Report did not, in terms, address the issue of that certificate.

34 At the conclusion of the meeting of the Panel on 5 November there were a number of resolutions that were carried unanimously. It is only the first of those resolutions which is presently relevant. It was as follows:

"A. That the Ku-ring-gai Planning Panel adopts the draft *Ku-ring-gai (Town Centres) Local Environmental Plan 2008* for exhibition in accordance with section 66 of the *Environmental Planning and Assessment Act 1979*."

35 The competing submissions of the parties render it necessary that the provisions of s 65 be quoted. The section, in the form it took on 5 November 2008, provided:

"65 Certificate of Director-General

(1) Where the Director-General receives a copy of a draft local environmental plan from a council under section 64, the Director-

General may cause to be issued to the council a certificate certifying that the draft plan may be publicly exhibited in accordance with section 66.

(1A) A certificate is not to be issued under this section unless the Director-General is satisfied that the draft local environmental plan has been prepared in accordance with any applicable standard instrument under section 33A. This subsection does not limit the grounds on which a certificate may be refused or the draft plan may be required to be amended under this section.

(2) A certificate issued under this section may be granted subject to the condition that the draft local environmental plan be amended in the manner specified in the certificate before it is publicly exhibited in accordance with section 66.

(3) Where a certificate is not issued under this section, the Director-General shall return the draft plan to the council, giving the reasons why the certificate was not issued, and directing the council to amend the draft plan in such a manner as to enable a certificate to be issued, or to take such other action as is appropriate.

(4) The council shall comply with the direction given under subsection (3)."

36 Relevant to the interpretation and operation of s 65 is s 66. Subsection (1) of the latter section relevantly provides –

"(1) Where a council receives a certificate under section 65 with respect to a draft local environmental plan, it shall, after complying with any condition subject to which the certificate was granted and subject to the regulations:

(a) give public notice ...

(b) publicly exhibit ... a copy of ... [the] draft local environmental plan ...".

37 The facts and statutory provisions to which I have referred readily enable the essence of the applicant's submissions to be appreciated. The draft planning instrument having been "received" by the Director-General, his delegate was required to issue a certificate or cause such certificate to be issued as s 65 required. Ms Crouch was not the delegate of the Director-General authorised to issue that certificate, a fact that was expressly

conceded by the Minister. There being no certificate issued by the Director-General himself or any other person or body to whom the function had been delegated, the necessary precondition for exhibition of the draft Centres LEP had not been fulfilled.

38 Notwithstanding the concession by the Minister that I have just recorded and the "irregularity" in the issue of the certificate earlier identified, the Minister submits that invalidity does not arise for three reasons:

- (i) no certificate under s 65(1) was required;
- (ii) in the alternative, the effect of the Panel's resolution on 5 November 2008 was to approve the issue of the certificate; and
- (iii) assuming the issue of such a certificate was required and none was issued, upon the proper interpretation of the EPA Act, that failure did not result in invalidity of the Centres LEP as ultimately made by the Minister.

Requirement for the issue of a Certificate under s 65(1)

39 The Minister accepts that the effect of a certificate under s 65 is to satisfy the precondition for public exhibition under s 66. Its only statutory consequence is to permit that exhibition.

40 Having acknowledged the purpose said to be served by the issue of the certificate, he submits that the requirement for the issue of the certificate needs to be considered in the context of the Delegation, whereby the Panel, as the body preparing the draft Centres LEP, was also delegated to issue the s 65 certificate. There being no challenge to the validity of the Delegation, authorised by s 23 of the EPA Act, the process of issuing such a certificate was an artificial procedural exercise because it was hardly

conceivable that the Panel, having prepared and adopted the Panel's draft LEP, would not permit itself to exhibit it.

- 41 In the circumstances that here pertain, it is said that the "artificial procedural exercise" just identified leads to an absurd result requiring the Panel to undertake "the solemn farce" of issuing the certificate to itself. By reason of this result the well known observations of the High Court in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297 (per Gibbs CJ at 304) is prayed in aid.
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- 42 Such a result is to be avoided. Thus, the Minister submits, the opening words of s 66 should not be taken to apply where, in consequence of a delegation given in accordance with s 23, a council or body exercising its functions under Div 4 of Pt 3 of the EPA Act (as was the Panel in the present case) is authorised to issue the certificate to itself.
- 43 While the Minister's argument has some attraction, I have concluded that it is not correct. The function involved in preparing and submitting a draft local environmental plan to the Director-General in accordance with s 64 and also determining to exhibit the plan differs from the function of certifying the plan for public exhibition. So much, so it seems to me, is apparent from consideration of the statutory provisions.
- 44 It must be assumed that there was a legislative purpose intended by interposing the requirement for a certificate under s 65 between draft plan preparation and its exhibition. Consideration of the provisions of Pt 3 of the EPA Act would suggest that interposition of the requirement for certification arises by reason of the fact that preparation of a draft local environmental plan under Div 4 of Pt 3 is undertaken by a council or other body acting in its stead rather than by those over whom the Director-General exercises direct control. This would appear to be the explanation for the absence of any requirement for a comparable certificate in the case

of a draft regional environmental plan to be made under Div 3 of Pt 3, as those provisions stood in November 2008.

45 Perhaps more significantly, the provisions of s 65 itself identify matters to be addressed when performing the function under that section.

Subsection (1A) is a "gateway" provision requiring satisfaction to be had that the draft plan had been prepared in accordance with "any applicable standard instrument under section 33A". The last sentence of the same subsection also allows other matters to be considered in relation to the draft prior to its public exhibition. Alternatively, the provisions of subsection (2) enable consideration as to whether a conditional certificate should be issued.

46 Finally, where the certificate is given by a delegate of the Director-General, that delegate needs to be satisfied that the conditions upon which it is able to exercise delegation for the purpose of giving the certificate have been fulfilled. As is apparent from the terms of the Delegation that I have earlier quoted, the Panel was not able to exercise the function under s 65(1) unless the conditions stated in that Delegation were fulfilled. The fact that the Director-General had expressly delegated the function under s 65(1) suggests to me that the function was intended to be exercised and the further circumstance that conditions were imposed upon that exercise indicate that the Panel was meant to consider whether it was complying with those conditions when performing the function.

47 Focus must also be had upon the identity of the delegate, in this case the Panel, who is required to exercise the function. It can be expected that the functionary to whom the delegation is made is unlikely to be the person or persons actually drafting the planning instrument, notwithstanding that its substance may have been the subject of direction by the delegate. This has the consequence that there is work to do for the statutory provisions in requiring consideration of the matters identified in s 65, even if that involves no more than the delegate receiving a check list against requirements from those persons who actually drafted the instrument. As

the applicant submitted, to determine otherwise would be to deprive the provisions of both s 65 and the opening words of s 66 of any content.

48 I can accept that, at a practical level, it is most unlikely that a delegate, in the position of the Panel, would deny to itself the grant of the requisite certificate. That practical reality does not preclude the need for a certificate that is given after the requirements of s 65 have been addressed.

49 The requirement to issue a certificate under s 65, even where the function so to do has been delegated to the body responsible for preparation of a local environmental plan, does not, upon a proper consideration of the statutory provisions, lead to a "capricious and irrational" result (cf *Cooper Brookes (Wollongong)* per Mason and Wilson JJ at 321). Contrary to the Minister's submissions, a certificate under s 65 was required to be issued. Whether any failure to issue the certificate is intended to visit invalidity upon the Centres LEP will be separately considered.

Panel resolution of 5 November 2008: issue of a s 65 Certificate?

50 As I have earlier indicated, the Panel resolved at its meeting on 5 November 2008 to adopt the draft Centres LEP "for exhibition in accordance with section 66" of the EPA Act. The terms of this resolution, so the Minister argues, should be taken as a determination by the Panel that the s 65 certificate be issued and, having so issued, authorise the exhibition of the draft instrument. It is further submitted that the defective form of the certificate itself does not defeat the substance of the Panel's resolution.

51 Support for the effect attributed to the resolution of 5 November is said to be found in the events immediately preceding the Panel's formal meeting on that day. It will be remembered that Ms Crouch and other Panel members met with Council staff prior to the formal meeting. It was then that Ms Crouch signed the certificate. In consequence, so it is argued, the

resolution should be taken as ratification of Ms Crouch's action in signing the certificate.

52 In my opinion, the resolution of the Panel cannot be interpreted to have the effect attributed to it by the Minister. The reason for this lies essentially in the matters that I have addressed when determining whether a certificate under s 65 was required before the draft Centres LEP was exhibited.

53 The resolution does not, in terms, identify the matters necessary to be addressed when determining whether the certificate should be issued. While the October 2008 Report contains voluminous material from which matters relevant to the exercise of the s 65 function could be gleaned, I do not identify in the Report any requirement to consider such matters in the context of issuing that certificate. To the extent that it is relevant, neither the evidence of Ms Crouch nor that of Mr Fabbro, the Manager of Urban Planning with the Council and one of the Council staff members responsible for preparing the draft instrument, indicates that matters relevant to the s 65 function were drawn to Ms Crouch's attention. She simply signed the document presented to her.

54 It is for these reasons that I reject the Panel's resolution of 5 November 2008 as manifesting an exercise of the function delegated to it to issue a certificate under s 65 to exhibit the draft Centres LEP.

Section 65 certificate: compliance with conditions of Delegation?

55 A ground of challenge to the validity of the s 65 certificate advanced by the applicant turned upon the conditions attached by the Director-General to the Delegation. It was a condition of the Delegation that in exercising the function under s 65 and s 69, the Panel was required to comply with the Guidelines. The applicant claims that, assuming the Panel is taken to have issued a s 65 certificate for exhibition of the draft Centres LEP, in so doing it did not comply with the Guidelines, with the consequence that there was no valid exercise of the delegated function.

- 56 Reliance is placed upon cl 2.1.3 and 2.1.4 of the Guidelines. The context in which those clauses are found in the Guidelines are the provisions directed to information that "must be included in the material displayed during exhibition": cl 2.1.
- 57 In light of my determination that a s 65 certificate was required but that the Panel had not issued such certificate, it is strictly unnecessary for me to determine this ground of challenge. However, there seems to be substance in the submission of the Minister that any obligation imposed by cl 2.1.3 and 2.1.4 had not been engaged at the time of issuing a s 65 certificate. As the applicant otherwise argued, the issue of such a certificate was a necessary precondition to the exhibition of the draft Centres LEP.

Did the failure to issue the Certificate invalidate the LEP?

- 58 It is now settled legal principle that not every act of an administrative decision maker, when breaching an empowering statutory provision, will visit invalidity upon that act. As has been acknowledged (*Smith v Wyong Shire Council* [2003] NSWCA 322; (2003) 132 LGERA 148 per Spigelman CJ at [6]), the principle is settled by the majority judgment of the High Court in *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 as articulated at [91]:

"An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue."

59 The majority in *Project Blue Sky* then proceeded to discuss the erstwhile distinction made by courts when determining validity by asking whether a statutory provision was directory or mandatory. Having rejected that distinction as an appropriate test for validity of an act done in breach of a statutory provision their Honours continued (at [93]):

"A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid."

60 As the provisions of Div 4 of Pt 3 of the EPA Act make clear, the preparation and ultimate making of a local environmental plan is a staged process. That process is meant to proceed sequentially so that the legislation contemplates that once a decision to prepare a draft environmental plan has been made by a council (s 54), the taking of each subsequent stage assumes completion or performance of the stage immediately preceding it. Thus, by s 62, a Council preparing a draft environmental plan is obliged to consult ("shall consult") with relevant public authorities (if any) in so doing. Section 64 makes tolerably clear that the process of consultation required by s 62 is to be undertaken before the draft local environmental plan is submitted to the Director-General for the purpose of obtaining a certificate under s 65.

61 I have earlier set out the relevant provisions of ss 65 and 66. The latter section not only makes clear the need for the certificate to have issued under the former section, but also mandates the public exhibition of the draft instrument as the ensuing step to be taken in the plan making process. This ordered process provides an indication that if a step is not carried out, in the sense that the action taken or omitted to be taken does not conform to the statutory provisions pertaining to that step, then any subsequent step will lack the statutory foundation for it to be taken, thus resulting in invalidity. However, as *Project Blue Sky* indicates, such a result, in order to be correct, must be considered along with other factors pertaining to the proper interpretation of the critical statutory provision in context.

62 Consistent with the observations earlier made about s 65, its evident purpose is to afford to the Director-General the opportunity to examine the draft instrument so as to ensure its compliance not only with the general requirements for a proposed instrument but also to test the measure of its consistency with general policy for land use planning. The section gives effect to what is described by the Minister as "the collaborative process" envisaged by Pt 3 of the EPA Act, involving participation between a Council and the central government authority for planning in the State. That collaborative process is, in turn, informed by one of the objects of the EPA Act, expressed in s 5(b) as being to promote "the sharing of the responsibility for environmental planning between the different levels of government in the State". The executive head of the department of State responsible for environmental planning, namely the Director-General, is, understandably, the person nominated as the Minister's representative for the purpose of this collaborative process. Indeed, by s 13(2) of the EPA Act, the Director-General is "subject to the control and direction of the Minister" subject to exceptions not, for present purposes, relevant.

63 In the process of making a local environmental plan conformably with Div 4 of Pt 3 of the EPA Act, the issue of a certificate under s 65 is not the only point in the process at which the Director-General is able to exercise oversight. While the Minister ultimately makes the plan under s 70, the Director-General is first required to report to the Minister pursuant to s 69. That report must be considered before the Minister proceeds to make the local environmental planning instrument: s 70(1).

64 This necessary intervention by the Director-General in the process immediately before a draft planning instrument achieves the force of law is to my mind a matter of significance when determining whether failure to issue a certificate under s 65 invalidates a planning instrument subsequently made. It would undoubtedly be open to the Director-General or any other person to seek to restrain a council or body acting in its stead from proceeding with the statutory process of plan making if a draft local environmental plan was exhibited without a certificate issued by the

Director-General or his or her delegate. However, the prospect that such action may be available does not address invalidity of a local environmental plan that has been made in the absence of such a Certificate but where otherwise the statutory steps have been observed, in particular, where the Director-General has reported to the Minister conformably with s 69 and recommended the making of the draft instrument as a local environmental plan.

65 Expressed differently, where a certificate has not been issued under s 65, it is the performance of a function of the Director-General early in the plan making process that has not occurred. However, the consequence of the failure to perform the function at that stage is able to be redressed when the same functionary, namely the Director-General, exercises the oversight function reposed in that office when preparing the report and making a recommendation to the Minister conformably with s 69. Subsection (1) of the latter section identifies the matters that are to be the subject of that report, including compliance with the provisions of s 66, while subsection (2) repeats, in substance, provisions identical to those found in s 65(1)(A), except that subsection (2) of s 69 relates to the submission of the report to the Minister rather than the issue of a certificate.

66 In light of these provisions of the EPA Act, I conclude that, on the proper construction of Div 4 of Pt 3, it was not a legislative purpose to invalidate a local environmental plan where no valid s 65 certificate has issued in respect of that plan in draft but where otherwise the plan has been made conformably with the provisions of that Division. Such a conclusion is supported by the reasons of Spigelman CJ (Sheller JA agreeing) in *Smith v Wyong*.

67 In *Smith v Wyong*, the validity of a local environmental plan made under the provisions of the EPA Act was challenged. One ground of challenge was that the plan had been made in breach of a direction given by the Minister under s 117 of the EPA Act. After analysing the relevant

legislative provisions and applying the principles in *Project Blue Sky*, the Chief Justice determined that invalidity of the plan did not result from failure to comply with the s 117 Direction. In the course of reaching that conclusion the Chief Justice said:

"[38] It is also significant that the relevant obligation is created by the Minister and not by legislation or delegated legislation. This is the same officer who ultimately determines whether a plan should be made and who has the option of deciding not to proceed with the plan (s 70(1)9(c)). The ability to regulate a failure to comply with s 117(3) is in the same hands as the person, or his or her predecessor, who made the Direction. A Minister may withdraw a direction at any time. Furthermore, as noted above, the Minister may decide to make a plan which is inconsistent with a Direction.

[39] It is, in my opinion, unlikely that Parliament intended that a failure to comply with a Direction results in invalidity when the person who made the Direction is in a position to determine the fate of the non-complying conduct."

68 Although the particular statutory provisions considered in *Smith v Wyong* differ in their expression from those presently being considered, the consequence of applying provisions there being considered are analogous to the consequences from applying the present provisions. The Director-General whose s 65 function has not been exercised "is the same officer who ultimately" reports to the Minister and recommends whether the power under s 70 to make a local environmental plan should be exercised. In so doing, the Director-General has a second opportunity to address the consequence, if any, of the failure to perform the earlier function. Indeed, that opportunity could result in the re-setting of the plan making process back to the s 65 stage by then issuing the requisite certificate, with or without conditions, and then requiring the steps under s 66 and those that follow to be undertaken once again. To adopt the reasoning of the Chief Justice at [39], 'it is unlikely that Parliament intended that a failure to issue a s 65 Certificate results in invalidity when the person (Director-General) whose function was not performed as required is in a position to determine the fate of that failure'.

69 In arriving at the conclusion that he did in *Smith v Wyong*, Spigelman CJ applied the observations of McHugh JA (as his Honour then was) in *Woods v Bates* (1986) 7 NSWLR 560. The reasoning in the latter case was approved by the High Court in *Project Blue Sky*. In *Woods v Bates*, McHugh JA said (at 567):

"In recent times the courts have shown great reluctance to invalidate an act done pursuant to a statutory provision because of the failure to comply with an antecedent condition: [citation of authority omitted]. Speaking generally, I think that, at the present time, the proper approach is to regard a statutory requirement, expressed in positive language, as directory unless the purpose of the provision can only be achieved by invalidating the result of any departure from it, irrespective of the circumstances or resulting injustice: cf *Hatton v Beaumont* [1977] 2 NSWLR 211 at 226 per Mahoney JA."

70 Applying the observations made in *Woods v Bates*, it is appropriate to ask, "can the purpose of s 65 only be achieved by invalidating the result of the departure from it?" In my opinion, the answer is "no".

71 It is for these reasons I discern no legislative purpose in the EPA Act to invalidate a local environmental plan, otherwise lawfully made, by reason of failure on the part of the Director-General (or his or her delegate) to have issued a certificate under s 65. As the consequences (if any) of the failure to issue the certificate must necessarily be addressed as part of the statutory process of which s 65 is an earlier component, it cannot have been the intention of Parliament that such breach would have all the adverse and potentially serious consequences sounding in a determination that the local environmental plan is invalid (cf *Smith v Wyong* at [26] – [29]).

Exhibition of the draft LEP: compliance with s 66 of the EPA Act

72 The public exhibition and notification of a draft local environmental plan is a fundamental step in the process of plan making under Div 4 of Pt 3 of the

EPA Act. Stein J (as his Honour then was) stated in *Curac v Shoalhaven City Council* (1993) 81 LGERA 124 at 128:

"Reasonable opportunities for public participation in plan making and in the development process are crucial to the integrity of the planning system provided under the *Environmental Planning and Assessment Act*."

73 As I have already observed, s 66 of the EPA Act mandates the public exhibition of a draft local environmental plan. Given the significance placed upon the requirements of this section by the applicant in identifying the various bases upon which this ground of challenge is sought to be sustained, it is necessary to quote the section in full. In the form that it took at the date of the Panel's resolution to publicly exhibit the draft Centres LEP, namely 5 November 2008, the section relevantly provided as follows:

"66 Public exhibition of draft local environmental plan

- (1) Where a council receives a certificate under section 65 with respect to a draft local environmental plan, it shall, after complying with any condition subject to which the certificate was granted and subject to the regulations:
 - (a) give public notice, in a form and manner determined by the council, of the place at which, the dates on which, and the times during which, the ... draft local environmental plan may be inspected by the public,
 - (b) publicly exhibit at the place, on the dates and during the times set out in the notice:
 - (i) a copy of that ... draft local environmental plan,
 - (ii) a copy of any standard instrument, environmental planning instrument or direction under s 117 that substantially governs the content and operation of the draft local environmental plan (or provide for access to such copy), and
 - (iii) a statement to the effect that any such standard instrument, environmental planning

instrument or direction substantially governs the content and operation of the draft local environmental plan and that any submissions made pursuant to s 67 should be made having regard to that fact,

- (c) specify in the notice, the period (being a period which is or includes the period referred to in subsection (2)) during which submissions may be made to the council in accordance with section 67, and
 - (d) publicly exhibit such other matter as it considers appropriate or necessary to better enable the draft plan and its implications to be understood.
- (2) A draft local environmental plan shall be publicly exhibited for a period being not less than the prescribed period.
- (3) Where, for the purposes of informing the public generally, a council decides to publicly exhibit a draft local environmental plan otherwise than in accordance with subsection (1), or to publicly exhibit any other matter which could be construed or represented as having a similar purpose to a draft local environmental plan, it shall at the same time publicly exhibit a statement to the effect that the exhibition is not to be regarded as an exhibition for the purposes of this Act."

74. In *Homeworld Ballina Pty Ltd v Ballina Shire Council* [2010] NSWCA 65; (2010) 172 LGERA 211, the Court of Appeal identified two purposes that are served by exhibition pursuant to s 66. They were identified at [11] as follows:

"The purpose of the exhibition itself is no doubt twofold: first, it allows for the public to be informed about a new LEP or changes to an existing plan. Secondly, it will provide an opportunity for those members of the public who wish to do so to make written submissions to the Council with respect to the provisions of the draft plan as publicly exhibited: s 67. Those submissions may result in a public hearing if the issues raised are of sufficient significance: s 68. These sections form an important mechanism for giving effect to one of the principal objects of the Act, namely to provide 'increased opportunity for public involvement and participation in environmental planning and assessment': s 5(c)."

75 There are a number of alternate bases upon which the applicant submits that such public exhibition and notification as did take place did not comply with the requirements of s 66. The totality of its submissions in this regard are captured by the statement that the exhibition was "incomplete, invalid and misleading". In order to understand the submission of the parties, it will be necessary to refer to the facts surrounding the exhibition in greater detail than I have earlier indicated.

76 At an early stage in the preparation of the draft Centres LEP, the Panel had before it a report prepared by Council staff addressing the means by which publication and notification would be provided in respect of the draft implement when it was finally adopted for exhibition by the Panel. These matters were reflected in a report dated 19 March 2008 (**the March 2008 Report**) which was provided to members of the Panel for consideration at its meeting held on 26 March. The resolution of the Panel was to proceed with preparation of a "revised Ku-ring-gai Town Centres draft local environmental plan" in terms of the recommendation made to it in the March 2008 report. The resolution does not, in terms, adopt the report as a whole. It is silent in that regard.

77 The October 2008 Report was, as I have earlier indicated, before the Panel on 5 November 2008 when it resolved to exhibit the draft Centres LEP. In that Report there was reference to a consultation program that had already been undertaken in accordance with earlier recommendations of the Panel. That Report also identified what was described as "the consultation program for exhibition" for the draft Centres LEP.

78 Once again, the Panel did not, in terms, resolve to adopt the consultation program for exhibition" outlined in the October 2008 Report. The resolutions passed at its meeting on 5 November are in identical terms to those recommendations made to it by the Panel. The terms in which the first of its resolutions adopting the draft Centres LEP for exhibition has earlier been quoted. Two further resolutions of the Panel at that meeting and relevant for present purposes should be noted. They are –

- "B. That Ku-ring-gai Planning Panel exhibit the *draft Ku-ring-gai (Town Centres) Local Environmental Plan 2008* for a minimum period of 28 days.
- C. That the *draft Ku-ring-gai (Town Centres) Local Environmental Plan 2008* be exhibited in accordance with the Best Practice Guidelines published by the Department of Urban Affairs and Planning in January 1997 titled '*LEPs and Council Owned Land – Guidelines for Councils using delegated powers to prepare LEPs involving land that is or was previously owned or controlled by a Council*'."

Having regard to the terms of the three resolutions specifically directed to exhibition, the fact that these resolutions are identical to the recommendations made in the October 2008 report and the steps directed to exhibition were outlined in that report are matters that lead me to conclude that the Panel intended exhibition to take place as the Report indicated would be the case.

- 79 On 7 November 2008 letters were sent on behalf of the Panel to persons falling into five categories. Two of those were owners and occupiers respectively of properties located within the boundaries of each of the identified town centres; two were sent to the owners and occupiers respectively of properties identified as being within the vicinity of the boundaries of each of the identified town centres and the fifth category involved the remaining owners or occupiers of property located within the Ku-ring-gai local government area. According to the evidence of Mr Fabbro, approximately 45,000 letters were sent on behalf of the Panel. While the text of each letter varied slightly for each of the five categories of recipient, common to each of them were paragraphs in or to the following effect:

"The Ku-ring-gai Planning Panel has resolved to exhibit and seek public comment on the draft Ku-ring-gai local environmental plan (LEP) 2008 (Draft LEP).

...

The Draft LEP with supporting information which includes background reports and maps, will be on exhibition from Monday 17 November to Friday 19 December 2008.

A formal staffed display of the Statutory Exhibition (Section 66 Environmental Planning and Assessment Act 1979) of the Draft Plan with supporting material can be viewed at the Council Chambers, Level 3, 818 Pacific Highway, Gordon, from 8.30am to 5.00pm Monday to Friday.

The Draft Plans are available on Council's website at www.kmc.nsw.gov.au as from Monday 17 November 2008.

Key exhibition materials will be on display at Council's Libraries located at St Ives, Gordon, Turramurra and Lindfield. Library hours are available on Council's website."

Each letter was headed –

"EXHIBITION OF DRAFT KU-RING-GAI LOCAL ENVIRONMENTAL PLAN (TOWN CENTRES) 2008".

- 80 Exhibition of the draft Centres LEP was advertised in the North Shore Times newspaper on each of 14, 19 and 28 November and again on 17 December 2008. This advertisement referred to the resolution of the Panel to exhibit the draft Centres LEP in accordance with s 66 of the EPA Act. After briefly describing the land to which it applied and its purpose, the period of exhibition from Monday November 17 to Friday December 19 2008 was indicated. Under the heading "Viewing the Draft LEP", the advertisement contained the following statement:

"The Draft LEP and supporting material will be on exhibition at Council Chambers, Level 3, 818 Pacific Highway, Gordon, from 8.30am to 5.00pm Monday to Friday. Key exhibition materials will also be on display at Council's libraries at St Ives, Gordon, Turramurra and Lindfield during library hours and on Council's website www.kmc.nsw.gov.au/exhibition".

- 81 It is not disputed that prior to 17 November 2008 an area was set aside on Level 3 of the building accommodating the offices and the Chambers of

the Council at 818 Pacific Highway, Gordon. The area set aside for exhibition included a counter on which there were three folders. One folder was entitled "Draft Ku-ring-gai LEP (Town Centres) 2008 Exhibition Material: A", while each of the remaining two folders were titled "Draft Ku-ring-gai LEP (Town Centres) 2008 Supporting Documentation" volumes 1 and 2 respectively. Included in the first folder to which I have referred was both the draft local environmental plan itself, together with the maps to which it referred. Spare copies of the draft as well as maps were also placed on the counter.

- 82 Some 18 exhibition panels were located in this same room. These panels contained both text as well as architectural images of block models identified as relating to "key sites" envisaged by the draft instrument. In addition, a television screen displayed a moving aerial view of block images of each of the town centres, intended to demonstrate the scale of development anticipated under the draft instrument.
- 83 Throughout the exhibition period of this material on Level 3, a member of the Council's planning staff was present at all times. This occurred each working day between 8.30am and 5.00pm.
- 84 As the letters sent on behalf of the Council and newspaper advertisements had indicated, documents were displayed at Council owned libraries at St Ives, Gordon, Turramurra and Lindfield. In addition to a copy of the draft Centres LEP and the maps to which it referred, this material also included the October 2008 Report together with a set of four large laminated display panels containing general information about the draft local environmental plan. Each panel contained an architectural block image reflecting the town centre precinct proximate to the library in which the material was displayed. At each library location an adhesive sticker was affixed to the material, which contained the following:

~~"The information on this display contains the key exhibition material for the Draft KLEP (Town Centres), however it is not the~~

statutory exhibition under Section 86 of the Environmental Planning and Assessment Act 1979. The statutory exhibition is on display at the Ku-ring-gai Council Chambers 818 Pacific Highway Gordon during the exhibition period – 17 November 2008 to 19 December 2008.”

85 Prior to commencement of the exhibition period for the draft Centres LEP, Mr Fabbro arranged for documents described as “key materials” to be reduced to a digital format and then recorded on a DVD. The materials contained on the DVD did not include all the material that was exhibited at the Council’s Chambers, but did include a copy of the draft instrument and maps. Copies of these DVDs were available to those who requested them at both the Council Chambers during the exhibition period and also at the Council libraries.

86 On 14 November 2008 copies of the DVD were sent to the owners and occupiers of all properties both within and in the vicinity of the boundaries of each of the Town Centres. These DVDs were contained in a sleeve or jacket on which was a statement that included the following:

“The Ku-ring-gai Planning Panel is seeking your comments on the Draft Local Environmental Plan (Town Centres) 2008. All of the key exhibition material is provided to you on this DVD. The information will help you understand the work undertaken by the Panel and Council so you may make an informed submission, should you choose to.

The Draft LEP and supporting information will be on exhibition from Monday 17 November until Friday 19 December 2008. This will be available for viewing at the Council Chambers, 818 Pacific Highway, Gordon and information will also be available at Council’s libraries, located at St Ives, Gordon, Turramurra and Lindfield. The Draft plan may also viewed on Council’s website ...”

87 Upon being accessed by computer, the material contained in the DVD was preceded by a display in the following terms:

“Disclaimer: The information on this DVD contains the key exhibition material for the Draft KLEP (Town Centres) 2008, however it is not the statutory exhibition under Section 66 of the Environmental Planning and Assessment Act 1979. The statutory exhibition is on display at Ku-ring-gai Council Chambers 818 Pacific Highway, Gordon during the exhibition period.”

88 As the various letters, notices and advertisements to which I have referred indicate, material relevant to the exhibition was also available on the Council's website. It is not suggested by the Minister that all material exhibited at the Council's chambers could be accessed on that website. The introductory page of that website contained a statement that included the following:

"The Ku-ring-gai Planning Panel has resolved to exhibit and seek public comment on the draft Ku-ring-gai Local Environmental Plan (Town Centres) 2008 (draft LEP) in accordance with section 66 of the *Environmental Planning and Assessment Act 1979*.

...

The draft LEP with supporting information, background reports and maps will be on exhibition from Monday 17 November to Friday 19 December 2008.

The draft LEP and supporting material will be on exhibition at the Council Chambers, Level 3, 818 Pacific Highway, Gordon, from 8.30am to 5.00pm Monday to Friday.

Key exhibition materials will also be on display at Council's libraries located at St Ives, Gordon, Turramurra and Lindfield during library hours."

89 It has been necessary to refer to the manner of exhibition and notification in its various forms by reason of the submission made on behalf of the applicant that the exhibition was misleading and therefore led to invalidity of the planning instrument. Without intending disservice to the submission, it turns, in large measure, upon the difference in material displayed at the Council's Chambers on the one hand and at libraries on the other.

Related to that distinction is reference to "key exhibition materials" as being available at the libraries or on the DVD without those materials being exhaustive of what the applicant submits is required. However, that general observation does not reflect the different bases upon which the validity of the exhibition is challenged and it is to those matters that I now turn.

Failure to comply with exhibition requirements pertaining to SEPPs and REPs

90 It will be noticed from the provisions of s 66(1)(b) that documents required to be publicly exhibited "at the place, on the dates and during the times" identified in the public notice of exhibition include a copy of any environmental planning instrument that "substantially governs the content and operation" of the draft local environmental plan being exhibited (paragraph (ii)) together with a statement that any such environmental planning instrument substantially governs the content and operation of the exhibited draft local environmental plan and that any submission made pursuant to s 67 "should be made having regard to that fact" (paragraph (iii)). It is submitted by the applicant that these requirements were not met as they related to the requirement for exhibition of State environmental planning policies (**SEPPs**) and regional environmental plans (**REPs**). Included in Folder 1 bearing the label Draft Ku-ring-gai LEP (Town Centres) 2008 Exhibition Material: "A" (**the Statutory Exhibition Bundle**), available at the Council's chambers at the exhibition site and throughout the exhibition period were several documents relevant to this ground of challenge. Behind Tab 1 in the Statutory Exhibition Bundle was a document summarising the reasons for preparation of the draft Centres LEP, the exhibition process and the capacity to make submissions. Included in that document is the following statement:

"The standard instrument, relevant environmental planning instruments and s. 117 directions substantially govern the content and operation of the draft local environmental plan and under s 66(1)(b)(iii) of the Environmental Planning and Assessment Act 1979, any submissions made pursuant to section 67 of that Act should be made having regard to that fact."

91 Behind Tab 9 of the Statutory Exhibition Bundle is a document that included a list of the then current SEPPs and REPs. Beside each of the listed instruments is a tick indicating whether or not the instrument is relevant and, if relevant, whether the draft local environmental plan is consistent with it. At the end of the list the following statement appears:

"NOTE: State Environmental Planning Policies and Regional Environmental Plans may be viewed at the Department of Planning Information Centre, 23 – 33 Bridge Street, Sydney, 9.00am – 5.00pm Monday to Friday (ph 92286333) or the Department's website www.planning.nsw.gov.au."

92 At Tab 11 of the Statutory Exhibition Bundle is a single page document in two parts. The first part is headed "Relevant State Environmental Planning Policies" and beneath that heading there are listed nine SEPPs, the name and number (where relevant) of which are given. Beneath the second heading that reads "Relevant Regional Environmental Plans" are listed by name two regional environmental plans. Beneath the listing of "relevant" SEPPs and REPs is a statement indicating where access to these instruments might be had, that statement being expressed in the same terms as that appearing at the foot of the documents found behind Tab 9, the terms of which statement I have already quoted.

93 Compliance with the requirements of s 66(1)(b)(ii) and (iii) is unquestionably essential (*Smith v Wyong* per Spigelman CJ at [59] and Tobias JA at [176]). It fulfils one of the objects of the EPA Act, namely that expressed in s 5(c), the relevant terms of which I have earlier quoted. Moreover, matters to which submissions in response to the public advertisement of the draft instrument are to have regard are those s 117 directions and other environmental planning instruments that substantially govern the draft planning instrument that has been advertised: 66(1)(b)(iii). Thus the importance of identifying those directions and other planning instruments that substantially govern the content of the advertised draft instrument.

94 The applicant asserted failure to comply with subparagraphs (ii) and (iii) of paragraph of s 66(1) on three bases. First, it asserted that there was no statement indicating that nominated s 117 directions; SEPPs and REPs substantially governed the provisions of the draft Centres LEP. Second, it is said that neither relevant SEPPs nor REPs were publicly exhibited at

any venue identified in the published advertisement or letters sent to residents relevant to the exhibition of the draft instrument. Third, access to a copy of these documents was not provided "at the place" of exhibition.

- 95 In the course of submissions on behalf of the Minister, the first of these grounds of challenge was withdrawn by the applicant. That is, it was accepted that the statement which I have quoted from the document behind Tab 1 of the Statutory Exhibition Bundle, coupled with the lists behind Tabs 9 and 11, satisfied the requirements of s 66(1)(b)(iii) (Transcript p. 43:40).
-
- 96 Other than the submission that the statement required by subparagraph (iii) was not included in the exhibition material, no specific reliance is placed by the applicant upon the identification of relevant directions under s 117 of the EPA Act. A list of such directions was in fact included behind Tab 9 of the Statutory Exhibition Bundle. As the ground of challenge relevant to the statement is no longer pressed, it is necessary to focus only upon the exhibition of SEPPs and REPs in order to consider the applicant's submissions.
- 97 It is accepted by the Minister that none of the SEPPs or REPs listed in the Statutory Exhibition Bundle were included among the materials that were exhibited or available at any of the venues identified in either advertisements published on behalf of the Panel or in letters sent on its behalf to residents of Ku-ring-gai. It relies upon the words in parentheses contained in subparagraph (ii) of paragraph (b) of s 66(1). It will be noticed that the subparagraph provides for a copy of a planning instrument substantially governing the content and operation of the exhibited draft to be publicly exhibited "or provide for access to such a copy".
- 98 The form which subparagraph (ii) and (iii) of s 66(1)(b) took in November 2008 was as a consequence of amendment made by the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005*. The amendment effected by the latter Act took effect

from 30 September 2005. Prior to that date s 66(1)(b) relevantly provided as follows:

- (b) publicly exhibit at the place, on the dates and during the times set out in the notice:
- (i) a copy of that ... draft local environmental plan,
 - (ii) a copy of any State environmental planning policy, regional environmental plan, or relevant direction under section 117, applying to the land to which the draft local environmental plan is intended to apply, and
 - (iii) if such a policy, plan or direction does so apply – a statement to the effect that the policy, plan or direction referred to in subparagraph (ii) substantially governs the content and operation of the draft local environmental plan and that any submission made pursuant to section 67 should be made having regard thereto ...”.

Although the Minister’s Second Reading Speech on the Bill that became the amending Act does not address the amendments to s 66(1), it is accepted by the applicant that the amendment effected was intended to address the decision of the Court of Appeal in *Smith v Wyong*. The Court there held that the relevant direction under s 117 was itself required to be exhibited in accordance with provisions of s 66(1)(b) as they then stood.

99 Both the statutory language, as it stood in November 2008 and the history to its amendment make clear that neither the SEPPs nor REPs identified in the Statutory Exhibition Bundle were required, in themselves, to be part of the exhibited material. Having identified those particular planning instruments that substantially governed the content and operation of the draft Centres LEP, the purpose of the legislative provision, so it seems to me, was to inform the reader of exhibited material how access to a copy of those planning instruments could be obtained. The note attached to the documents behind Tabs 9 and 11 of the Statutory Exhibition Bundle supplied to the reader the means by which access could be arranged. Such an approach is, I believe, consonant with the meaning of the phrase “provide for” (Macquarie Dictionary, meaning a).

100 In addressing the meaning to be given to the provision under consideration, there are two further matters that I take into account. First, both SEPPs and REPs are statutory instruments: s 3, *Interpretation Act* 1987. It is and was as at November 2008 publicly available "legislation", published on the NSW legislation website, Pt 6A *Interpretation Act*. Second, the reader of the exhibited material should be seen as an "interested reader" (*Homeworld Ballina v Ballina Shire Council* at [25]) per Basten JA. As such, it can be expected that the attention of such reader will come to the note endorsed on the documents appearing behind Tabs 9 and 11 of the Statutory Exhibition Bundle and, if interest is maintained, pursue the references there made.

101 The evidence reveals that there were computer terminals located within the Council's chambers that could be utilised to gain access to the website of the Department of Planning. In particular, Mr Fabbro states that in the customer service area located on level 4 of the Council's chambers there are six computer terminals within an area described as the Customer Service Area. Terminals in that location are able to be used by Council staff at the request of members of the public in order to display information that is sought.

102 Mr Fabbro points to the fact that a staff member was present at all times during the period of exhibition of the draft local environmental plan, the sole function of that staff member being to respond to any questions or requests made by members of the public inspecting the exhibition material. If access to any information available by computer was sought by a member of the public then the staff member present at the exhibition was able to refer the enquirer to the Customer Service Section where the information sought would be retrieved by another member of the Council staff. If a hard copy of the document viewed on the computer terminal was sought by the enquirer then a printed version of the material was able to be provided.

103 The applicant contends that the existence of this facility did not conform to the requirements of s 66(1)(b)(ii). In essence, it submits:

(i) the "place" at which the exhibition was undertaken, in accordance with the notice given under s 66(1)(a) and published in the North Shore Times newspaper, was "Council Chambers, level 3" at the nominated address in Gordon and computer access to the SEPPs and REPs was not provided at that "place";

(ii) while nominating the Department's website as a source for viewing the relevant planning instruments, the statement attached to the lists of instruments behind tabs 9 and 11 of the statutory bundle failed to indicate that computer access to that website was available from level 3 or any other place within the Council's chambers;

(iii) a person reading the lists of relevant SEPPs and REPs together with the statement endorsed at the foot of those lists indicating the means by which the instruments may be viewed would reasonably understand that it was necessary to go elsewhere in order to view those instruments and not be able to obtain access to them at or proximate to the "place" of exhibition; and

(iv) accepting that the Customer Service Area on level 4 is in a prominent position close to the pedestrian entrance to the Council's chambers, access to level 3 could be gained by a person whose sole purpose was to view the exhibition material without the necessity to pass through level 4, with the consequence that the

facility of staff assisted access to a computer terminal would not be apparent to those bypassing that level.

104 Notwithstanding these submissions, I do not consider that the provisions of s 66(1)(b)(ii) were breached. The 2005 amendment to paragraph (b)(ii), allowing the exhibited material to "provide for" access to a copy of the relevant planning instruments, not only has the consequence that a copy of the instrument itself need not be on exhibition but also imposes a lesser obligation than that which would arise if the requirement was to "provide access" to those documents. Having identified the operative planning instruments that substantially govern the content and operation of the draft instrument under consideration, paragraph (b)(ii) requires only that the means by which a copy of those operative planning instruments may be obtained be stated in the exhibited material at the "place", time and during the dates of exhibition required by the opening words of paragraph (b) of s 66(1).

105 As is made clear by paragraphs (b)(ii) and (iii), the purpose of the provision is to direct the interested reader of the exhibition material to those other planning instruments that inform the content and operation of the exhibited draft instrument for the purpose of framing any submission that the reader may seek to make. Having identified the relevant operative instrument or instruments that inform the content and operation of the draft and also stating the means by which access to those instruments might be obtained, the purpose of the statutory provisions is fulfilled.

106 If immediate access at the "place" was required, then the means by which that could be achieved was enquiry of the member of the Council's staff employed for the express purpose of facilitating an understanding of the exhibited material should that assistance be sought. While the employment of persons to assist in that way is not, in terms, the subject of any obligation created by s 66, the capacity to meet the requirement imposed by paragraph (b)(ii) by "providing for access" to a copy of those instruments, recognises, as one means of fulfilling the statutory

requirement, the presence of personnel able to facilitate the provision of access to a copy. The member of Council's staff stationed on level 3 ("the place of exhibition") was able to fulfil that purpose. The fact that enquirers may have been referred by the staff member on level 3 to another staff member on level 4 of the Council's chambers so as to operate a computer terminal does not, to my mind, detract from that conclusion.

- 107 For these reasons, I reject the submission that the exhibition failed to comply with the requirements of s 66(1)(b)(ii) and (iii).

Form and manner of exhibition

108 The applicant asserts that the public exhibition of the draft Centres LEP was not effected in accordance with s 66 of the EPA Act by reason of the failure to comply with the section as to the form and manner of exhibition mandated by the section. This submission is advanced on a number of bases.

109 First, it is submitted that the Panel failed to determine the "form and manner" of giving public notice of the draft Centres LEP as it was required to do by s 66(1) of the EPA Act. It submits that the Panel's failure to observe the requirements of the subsection is manifest from the fact that –

- (i) there is no evidence that the Panel resolved or otherwise determined "the form and manner" of public notice to be given as it was required to do by s 66(1)(a); and
- (ii) there is no evidence of any resolution or determination otherwise as to the "other matter" to be exhibited that was "appropriate or necessary to better enable the draft plan and its implications to be understood", as s 66(1)(d) required it to do.

110 It is correct to observe that at its meeting on 5 November 2008, the Council did not, in terms, adopt a resolution determining the form and manner of giving public notice of the place at which and times during which the draft Centres LEP would be exhibited, making specific reference to the provisions of s 66(1)(a). However, it is necessary to consider whether by its actions the Panel can be taken to have made the requisite determination.

111 From my earlier recitation of fact, it will be recalled that the preparation of the draft Centres LEP at the instigation of the Panel, relevantly commenced with the Panel's resolution of 26 March 2008 determining that a "revised" draft instrument be prepared "as outlined within the report" and be presented for consideration at a meeting of the Panel before the end of June 2008. The report to which the resolution referred is the March 2008 Report. The expressed purpose of that report was --

"to provide information to the Panel on the exhibition of the Ku-ring-gai Town Centres Local Environmental Plan."

112 Included in the March 2008 Report there are several paragraphs directed to notification required by the EPA Act. Under the heading "Notification" the following appeared:

"Notification letters to all landowners (including residents and businesses) within the six gazetted Ku-ring-gai town centre areas advising of the public display and the proposed information sessions (non statutory requirement).

Notification in the local press advising of the exhibitions with advertisements being placed prior to the exhibition period, during and prior to the end of the exhibition period (statutory requirement).

The advertisements would also include the times and dates of the information sessions (non statutory requirement).

Council website: All exhibition material to be displayed on Council's website at www.kmc.nsw.gov.au (non statutory requirement)"

113 Further observations were contained in the Report under a heading "public display of exhibition material". It made reference to a "statutory" exhibition of material for a minimum of 28 days at the Council chambers and the further exhibition of materials, described as "non statutory" at libraries located at St Ives, Gordon, Lindfield and Turramurra. Reference was also made to the exhibition at the Council Chambers including "a staffed display to provide direct information from the Council's urban planning staff throughout the exhibition period. The prospect of obtaining a "three-D town centre model and providing copies of the draft instrument "and associated material" on a CD, free of charge was also addressed.

114 While the draft Centres LEP ultimately exhibited was not in the form of the instrument discussed in the March 2008 Report, the Report itself is relevant to be noticed in the context of the present contention by the applicant. Not only did it alert the Panel to the manner in which the draft instrument could appropriately be exhibited, but also it is information that appeared to have been acknowledged by the Panel having regard to the terms of the minutes of its meeting of 26 March.

115 I have earlier made reference to the October 2008 Report considered by the Panel at its meeting on 5 November 2008. Under the heading "Consultation", that Report also contained a proposal for the manner in which the draft Centres LEP and other material would be exhibited and information about it disseminated to the community. The following appears:

"The consultation program for exhibition period [sic] will consist of the following:

- letters to all properties and households throughout Ku-ring-gai advising of the exhibition of the Draft LEP (35,000 letters);
- letters and DVD containing the key exhibition material sent to all property owners within the Panel boundaries and additional properties within the buffer areas adjoining the Panel boundaries (6,000 letters);
- a permanent staffed display at Council Chambers providing all exhibition materials and planning staff to answer questions from

the public. This display will include the town centres key sites, architectural displays/masterplans and a 3D electronic model of the key centres;

- exhibition displays at Council Libraries – St Ives, Turramurra, Gordon and Lindfield;
- a series of advertisements in the local press – giving notice of the exhibition throughout November and December 2008;
- key exhibition materials on Council's website ... ; and
- copies of the exhibition material on DVD will be available on request to assist persons making informed submissions on the draft plans."

116 Under the heading "Summary and Conclusions" of the Report the following paragraph appears:

"The formal exhibition of the draft LEP will include extensive notification and a formal staffed display at Council throughout the exhibition period. There will be a comprehensive distribution of the key exhibition material to all households in the planning panel boundaries and within the adjoining precincts. Exhibition of the key materials will also be at the Libraries and on Council's website.

A series of key recommendations are put forward at the end of this report for the Ku-ring-gai Planning Panels consideration to enable formal exhibition of the draft plans, consistent with the statutory requirements of the planning legislation and the written authorisation of delegations provided by the NSW Department of Planning."

117 That passage is followed by the recommendations to which I have earlier referred. As I have indicated, those recommendations were adopted verbatim from the report as the resolutions made by the Panel on 5 November 2008. I have earlier set out and do not repeat the terms of resolutions A, B and C. Suffice to note that resolution A referred to exhibition "in accordance with section 66" of the EPA Act while resolution B spoke of the exhibition period as being "a minimum period of 28 days." The minutes of the meeting of 5 November 2008 make reference to the documents circulated to Panel members, those documents including the October 2008 Report.

118 Having regard to the terms of the reports addressing exhibition that the Panel had considered, particularly the October 2008 Report, the fact that

those reports were before and considered by the members of the Panel at each meeting, coupled with the resolutions adopted at the meeting of 5 November 2008, I am satisfied that there was a determination by the Panel of the form and manner of exhibition as was required by s 66(1)(a). The location of the exhibition, the period during which the exhibition should take place and the content of some of that material, apart from the draft instrument itself (including attached maps) are included in the reports and resolutions to which I have referred as are references to background documents or reports that were placed on exhibition. The draft Centres LEP to be exhibited was attached to the Report.

- 119 It is correct to observe, as the applicant does, that the Panel did not have before it a draft of the notice that was to appear in the North Shore Times newspaper, nor the form of letter that was to be sent to residents. Nonetheless, the various mechanisms to be utilised for the purpose of giving public notice were identified in the material which, for reasons indicated, I have taken to have been impliedly determined by the Panel. Those mechanisms reflect the "manner" in which notice was to be given. Furthermore, the "form" is reflected in the statements of substance of the contents within the various mechanisms to be utilised. The absence of the precise words to be used in each form of notification seems not to be the purpose of the provision. It is the substance of what is to be done and the means by which notification is to be achieved that, to my mind, is the purpose of the opening provisions of s 66(1)(a).
- 120 The related contention of the applicant is that the content of public notification contravenes s 66 by reason of its inaccuracy. The "inaccuracy" claimed falls into two categories. First, it is submitted that the reference to the exhibition of material at the Council's chambers and the availability of material at various libraries wrongly created the impression that all were exhibition venues for the purpose of s 66(1)(b). Secondly, it is submitted that the reference to "key exhibition material" as being available at Council libraries, on the distributed DVD or on the Council's website was

misleading because the material there made available did not, in fact, contain "key exhibition material".

- 121 The principle that guides consideration of these issues is not in dispute. Section 66(1)(b) identifies the minimum requirements for exhibition of a draft local environmental plan. If, in giving public notice of a draft local environmental plan information beyond the date, time and place of exhibition, the published notice is inaccurate or misleading, then the exhibition pursuant to the subsection will miscarry (*El Cheikh v Hurstville Council* [2002] NSWCA 173; (2002) 121 LGERA 293 at [12]; *Gales Holdings Pty Ltd v Minister for Infrastructure and Planning* [2006] NSWCA 388; (2006) 69 NSWLR 156 at [110]).
- 122 A premise of the first of the applicant's submissions in this regard seems to be that by publishing the notice of the exhibition in the form that it did was tantamount to notifying a series of venues at which the exhibition required by s 66(1)(b) was being undertaken. It is necessary to consider whether that is a correct premise. In my opinion, it is not.
- 123 I have earlier set out material from the North Shore Times advertisement, letters, DVD and website of the Council which notified exhibition of the draft Centres LEP. In all media forms used for the purpose of notification or advertisement, the distinction was drawn, by the words used, between the "statutory exhibition of material" at the Council's chambers and "key exhibition material" available at the places or by the other means nominated. Further, the material "exhibited", by whatever means, at places other than the Council's chambers contained what the Minister described as a "disclaimer" by which the reader's attention was drawn to the fact that the material there being viewed "is not the exhibition under Section 66 of the Environmental Planning and Assessment Act". The "disclaimer" drew attention to the fact that the "statutory exhibition" was taking place at the Council's chambers.

124 The applicant submitted that the "reasonable reader with no knowledge of planning law" would not have appreciated the distinction being drawn in the notices between "the statutory exhibition" and the availability of relevant material described otherwise as "key exhibition material". The submission was founded upon the observation of Tobias JA in *Gales Holdings* where his Honour said (at [110]):

"The reasonable person the subject of the relevant test is a person with no knowledge of planning law and the relevant provisions of the LEP [citation omitted]".

125 I do not believe that Tobias JA was there attributing to the reader of the material the assumed ignorance that the applicant seeks to invoke. Indeed, the qualified manner in which his Honour's statement must be understood was recognised by the Court of Appeal in *Homeworld Ballina* (at [22] - [25]). The reference by Tobias JA to the reader of a statutory advertisement having "no knowledge of planning law" must, in my opinion, be taken to mean an absence of knowledge of the jurisprudence that lawyers might have gained by reference to decided cases spelling out the meaning and operation of a statutory provision in a particular context or perhaps an absence of knowledge of the principles of statutory interpretation.

126 As was observed by the Court of Appeal in *Homeworld Ballina*, the context in which a challenge of the present kind is being considered is a statutory context. It is one that expressly refers to the statutory provision pursuant to which the advertisement or notification, as the case may be, is being undertaken, namely s 66 of the EPA Act and is expressed in such a manner as to indicate that the draft local environmental plan, if made, will have the force of law. It can therefore reasonably be expected that the "interested reader" would appreciate that context and comprehend that if the draft Centres LEP and all its supporting material is to be considered then that is to occur at the Council's chambers. It requires no "knowledge of environmental law", in the sense earlier discussed, to read the published advertisement and other forms of notification in this matter. The words

used draw the distinction between the draft instrument “and supporting material on exhibition at Council Chambers” on the one hand and “key exhibition materials” being available at other venues. This exercise involves only a capacity on the part of the reader to understand the “structure and content” of the advertisements and notices (cf *Homeworld Ballina* at [22]).

- 127 In summary, I am not persuaded that the advertisements or notifications were inaccurate or misleading by the terms used to identify the place at which, the dates on which and the times during which the draft Centres LEP and the material supporting it would be exhibited conformably with s 66(1)(a) of the EPA Act. An interested reader of the notice would not be misled as to the place at which all material required to be exhibited was available for inspection.
- 128 The next basis upon which compliance with s 66(1)(a) is challenged is directed to the statement included in various media that “key exhibition materials” were available at libraries, on the DVD that was distributed or on the Council’s website. In short, it is said that the material so described did in fact omit “key” documents and was therefore a misdescription of that which was available. That misdescription, so it was submitted, was apt to mislead the reader of a notice or advertisement indicating the availability of such material or would mislead the viewer of the material into believing that nothing further was necessary to be considered for an understanding of the draft Centres LEP. It followed that the misleading notice or advertisement failed to conform with the requirements of the section (*E/ Cheik* at [12]).
- 129 In general, the applicant seeks to sustain its claim by comparing documents on exhibition at the Council Chambers and the material available at the libraries, on the DVD or on the website. In all cases, there were a lesser number of documents included among the “key exhibition materials” than were available at the Council Chambers. Further, the content of the “key exhibition materials” differed as between those

documents displayed at the libraries on the one hand and those documents able to be viewed on the DVD or website on the other.

130 Documents exhibited at the Council's Chambers but not available either on the DVD or the website are agreed as being the following:

- (i) a copy of the s 65 certificate;
- (ii) a copy of the Standard Instrument (Local Environmental Plans) Order 2006;
- (iii) the Draft LEP Users Guide;
- (iv) the s 117 Direction, SEPPs and REPs Assessment Check List;
- (v) a copy of relevant s 117 Directions;
- (vi) relevant SEPPs and REPs although a list of such instruments was included containing the statement earlier identified as to the availability of these instruments from the Department of Planning or on the Department's website;
- (vii) details of Council owned land included in the draft instrument;
- (viii) submissions made by the Council on reclassification of Council land; and
- (ix) a copy of the *Ku-ring-gai Planning Scheme Ordinance*, as amended.

131 In addition to the documents just identified, the "key" materials available at the libraries did not include the following –

- (i) exhibition explanatory notes;

- (ii) the *Environmental Planning and Assessment (Ku-ring-gai Council Planning Panel) Order 2008*;
- (iii) general community information provided in 2008;
- (iv) community information session presentations for each of Turramurra, St Ives, Gordon, Pymble, Lindfield and Roseville;
- (v) background reports on Town Centres Plans adopted by Ku-ring-gai Council in 2006;
- (vi) Ku-ring-gai Retail Centre Study – Hill PDA 2005;
- (vii) the Council Open Space Acquisition Strategy, November 2006;
- (viii) 2005 study on potential heritage items – heritage inventory sheets by Town Centre;
- (ix) Town Centres 2006 additional heritage items inventory sheets;
- (x) RTA response pursuant to s 62 concerning the town centres of Turramurra, St Ives, Lindfield and Roseville; and
- (xi) 3D sample videos of proposed Town Centres on YouTube.com.

132 While the applicant focused upon the documents omitted from the "key" materials by comparison with those exhibited at the Council Chambers, it recognised that the material was not devoid of content. That "key" material included the draft Centres LEP, the maps to which it referred, as well as a copy of the 2008 October report, although there was not included in the materials all of the attachments to that report. Nonetheless the report was

a lengthy and detailed report that included the rationale for preparation of the draft instrument.

133 Minds might reasonably differ as to all documents that are "key" or fundamental in the present context. There could be no doubt that the draft Centres LEP and its accompanying maps were key to anyone sufficiently interested to visit a library, the Council website or view the DVD. These were the materials that were included as "key" materials. Beyond them, scope for reasonable difference of opinion arises. I have earlier set out the "warnings" or disclaimer attached to each form of these "key" materials whereby the reader or viewer was told that those materials were not a complete set of documents and that the documents exhibited at the Council Chambers were those that constituted the statutory exhibition. Those "warnings" or disclaimer need also to be understood in the context of the published notice under s 66(1)(a), distinguishing between the exhibition and the availability of "key" materials at other venues.

134 As I understand the submission made by the applicant, it was not suggested that the meaning or impact of the draft instrument, understood in the context of the materials included only as "key" documents, would reasonably be understood differently if read in the context of all of the material on exhibition at the Council Chambers. That is understandable having regard to the documents identified as having been omitted from the "key" materials. None of them, so it seems to me, would be likely to alter the operation or affect of the draft instrument such that the reader of the "key" materials would be lulled into a false sense of security, believing that their interests are effected in one way when, a consideration of the full suite of available materials at the statutory exhibition would yield a different result (cf *Homeworld Ballina* at [29]).

135 For these reasons I do not accept the applicant's submission that the public exhibition of the draft Centres LEP miscarried by reason of the ~~limited number of documents identified as "key exhibition materials"~~ and made available in the manner indicated. The reader or viewer, alert to the

"warnings" or disclaimer, who was sufficiently interested to learn more was, with sufficient clarity, directed to the exhibition at the Council Chambers.

136 There is a further basis upon which the applicant submits that the exhibition miscarried by reason of its misleading nature. This claim arises from the material exhibited at the Council Chambers indicating the manner in which land owned by the Council will be affected by the draft instrument, if made, in the form exhibited. The identification of land so affected was required to be exhibited by the Guidelines. The Panel was aware of the need to exhibit this material, having had its attention drawn to the requirement in the October 2008 Report.

137 There were two documents exhibited in the Statutory Exhibition Material that are relevant to this ground of challenge. The first was headed "Council owned land included in draft LEP". Having made reference to the purpose of the draft instrument and to the Guidelines in its opening paragraphs, the document includes a table identifying "all Council owned land included in the draft LEP and the necessary information required by the Best Practice Guidelines." Immediately before the table, the following is stated:

*"Please note:
Information for the Best Practice Guidelines schedule has been gathered using a wide range of documents, historical records, and government agency resources. Every effort has been made to ensure that the information provided in the Best Practice Guidelines table is accurate to the extent that current available information allows and best reflects Ku-ring-gai Council's intentions for Council owned land."*

138 The table that follows then addresses land said to be owned by the Council by reference to its address. In respect of each property the current use and current zoning of the land is indicated, as is the zoning proposed for the land under the draft Centres LEP. The final column to the table for each parcel of land is headed "Anticipated Development". There seems to be a common formula for stating the Council's intention for the

land. In respect of some of the identified parcels of land the words that appear under this head are as follows –

"Reclassification of land being considered by Council – refer to tab 16 for anticipated development."

The alternate formulation of words appearing in this column against several of the identified parcels of land is –

"Community classified land not being considered by Council for reclassification – no proposed development."

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- 139 The second of the two documents to which I referred as being relevant to this ground is the document referred to as being "tab 16". It is a document headed "Council's submission to the Public Hearing for Ku-ring-gai Town Centres – proposed reclassification of Council lands". That document identified by its address each parcel of land owned by the Council, gave a description of both the current and proposed zoning and indicated the manner in which the Council would propose that the land be developed and used once reclassified as operational land.
- 140 Reference to the classification and reclassification of land owned by the Council is a reference to the manner in which public land is classified as either "community" land or "operational" land under s 26 of the *Local Government Act* 1993. Reclassification of community land as operational land is achieved by the making of a local environmental plan as required by s 30 of the *Local Government Act*.
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- 141 The essence of the applicant's submission is directed to a claimed omission from the two documents to which I have referred. The reader of those documents, so it was submitted, would conclude that only the lands identified as being under consideration for reclassification would be affected by the proposed planning instrument, if made, in a way that differs from their present potential. The argument continues that the reader of the material would reasonably believe that land identified as community land
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and in respect of which the documents disavowed present consideration for reclassification would therefore remain community land indefinitely and thereby precluded from higher density redevelopment.

- 142 The applicant further contends that the capacity of the Council, the Panel or the Minister to seek reclassification of the land as operational land at some time in the future ought to have been stated in the exhibited material. According to the applicant, it is the absence of any such statement that causes the exhibited material to be misleading. Reliance is placed in this regard upon the observations of Tobias JA in *Gales Holdings* where his Honour said (at [117]):

"I would accept the proposition that if a relevant document required to be publicly exhibited was misleading in the sense that the reasonable member of the public referred to by the appellant would be misled into believing that the subject land was to be rezoned Commerce or Trade and not Industrial, then the appellant should succeed on this ground of challenge."

- 143 The applicant seeks to exemplify its contention by referring to events that occurred following the exhibition of the draft Centres LEP. On 24 November 2009, that is, shortly before the Panel submitted the draft Centres LEP to the Minister pursuant to s 69 of the EPA Act, the Council resolved that a number of sites owned by it should be reclassified as operational land. Some eight of those sites had been identified in the material exhibited with the draft Centres LEP during November and December 2008 as being sites in respect of which no reclassification was then intended.

- 144 At the time of exhibition of the draft Centres LEP, the Panel itself had not resolved to seek reclassification of any Council-owned land as operational land (assuming it had any power so to do); it was wholly dependant upon the Council's statement of intent in that regard. The Panel exhibited that statement of intent in the form of the documents that I have identified. The applicant does not suggest that an absence of any reasonable basis for

the statements then made by the Council in the exhibited documents as to its intentions for reclassification.

145 As the Minister submits, the effect of the applicant's submission in this regard is that the published material contained only a "half-truth" in the absence of an expressed qualification that reclassification was open at any time in the future. Whether or not a "half-truth" be a correct description of the applicant's submission, it is necessary to ask whether, in all the circumstances, the interested reader of the documents would be misled into believing that the relevant sites identified by the Council could not be considered for reclassification, or if it was able to be so reconsidered, only the Council could embark upon the process of reconsideration (cf *Mikaelian v CSIRO* [1999] FCA 610; (1999) 163 ALR 172 at [75] – [76]). In my opinion, the interested reader would not be so misled.

146 There are several reasons for this conclusion. First, the advertisement notifying the exhibition made clear that it was the Panel which was responsible for the exhibition of the draft instrument and accompanying documents. Included among the documents exhibited at the Council Chambers were exhibition explanatory notes, a copy of the Order and a copy of the Delegation, all of which made clear to the interested reader of the material the different roles being exercised at that time by the Panel and the Council. As it was the Panel's exhibition, it would have been apparent that it was the Council indicating its intent in relation to the land owned by it and not a representation by the Panel as to its position in that regard.

147 Second, the paragraph preceding the table commencing with the note that I have earlier quoted made tolerably clear that the document stated the Council's present intent in respect of its land. The interested reader would not reasonably have understood that the intention expressed at the time of exhibition was immutable. No sophisticated understanding of local government law was required on the part of the interested reader to appreciate the realities of local government administration, requiring

consideration of the change to classification of public land in order to meet the governmental exigencies of the day in the interests of the community of the Ku-ring-gai local government area. The requirement for any reclassification of Council owned land, itself to be subject to the plan making processes under Pt 3 of the EPA Act (s 30 *Local Government Act*), no doubt explained the absence of the qualification from the exhibited material that the applicant submitted should have been included. Contrary to the applicant's submission, I am of the opinion that the absence of such a statement would not reasonably have lulled the reader into a false sense of security thereby believing that the land the subject of complaint would not be considered at some future time for reclassification.

- 148 For the reasons I have stated, I do not accept as correct this basis of challenge to the validity of the draft Centres LEP. The documents to which I have referred were not, in terms, the subject of an exhibition mandate contained in s 66(1)(b) but rather were documents exhibited conformably with s 66(1)(d), notwithstanding that their exhibition was undertaken by reason of the need to comply with the Guidelines which, in turn, was a requirement of the Delegation.

Compliance with s 66 of the EPA Act

- 149 I have not sustained any of the bases of challenge founded upon s 66. The notice given on behalf of the Panel pursuant to s 66(1)(a) satisfied the requirement that the public be notified of the place at which, the dates on which, and the times during which the draft instrument and supporting documents would be available for inspection. The notice was not misleading by indicating that "key exhibition materials" would be on display at other locations or by accessing the DVD or the Council's website.
- 150 Moreover, the material displayed was not itself misleading in the sense that it would have lulled persons whose interests may be affected by the instrument into a false sense of security, causing them to believe that their interests are not so affected (*cf Homeworld Ballina* at [p 29]). In so

concluding, I have kept firmly in mind the distinction between the analysis of material exhibited that is said to be misleading and the notice required to be published in accordance with s 66(1)(a) (*Homeworld Ballina* at [32] – [33]).

Ground (iii): amendment of draft Centres LEP by the Panel following exhibition

151 Following notification and exhibition of the draft Centres LEP, in excess of 1800 submissions were received from the public in addition to those received from State agencies. Those submissions were the subject of a detailed report dated 15 May 2009 (**the May 2009 Report**) prepared for the Panel by Council staff. The May 2009 Report recommended that a number of amendments be made to the exhibited draft Centres LEP. The Report further recommended that the revised draft Centres LEP be submitted to the Minister pursuant to s 69 of the EPA Act, requesting that the planning instrument be made in its revised or amended form.

152 At its meeting held on 27 May 2009, the Panel resolved to adopt the revised draft instrument and to seek its making by the Minister in accordance with the recommendation made to it.

153 The revised draft Centres LEP was not further notified and exhibited prior to being made (with further amendments) by the Minister on 25 May 2010. It is the absence of notification pursuant to s 66(1) that founds this ground of challenge by the applicant. In essence, it claims that the amendments made, in some cases individually but considered collectively, were so substantial that the planning instrument ultimately made was not the product of the process ordained by Div 4 of Pt 3 of the EPA Act for the making of a local environmental plan.

154 The power of a council (in this case the Panel) to amend a draft planning instrument that has been exhibited pursuant to s 66 of the EPA Act is

expressed in s 68. That section, in the form that it took on 27 May 2009, relevantly provided as follows –

“68 Consideration of submissions

- (1) Where:
 - (a) a person making a submission so requests, and
 - (b) the council considers that the issues raised in a submission are of such significance that they should be the subject of a hearing before the council decides whether and, if so, what alterations should be made,
~~the council shall, in the prescribed manner, arrange~~ a public hearing in respect of the submission.
- (2) A report of the public hearing shall be furnished to the council and the council shall make public the report.
- (3) The council shall consider the submission and the report furnished pursuant to subsection (2) and may make any alterations it considers are necessary to the draft local environmental plan arising from its consideration of submissions or matters raised at any public hearing.
- (3A) An alteration made by a council pursuant to subsection (3) need not relate to a submission.
- (3B) The council may (but need not) give public notice of and publicly exhibit, wholly or in part, a draft local environmental plan that has been altered pursuant to subsection (3). The provisions of this section and sections 66 and 67, with any necessary adaptations, apply to any such exhibition of a draft plan, but not so as to require a further certificate under section 65.

...”

155 The manner in which the applicant frames this ground of challenge has its foundation in the judgment of Priestley JA (Sheller JA agreeing) in *Leichhardt Council v Minister for Planning (No 2)* (1995) 87 LGERA 78. In that case the Court was required to adjudicate upon a regional environmental plan that had been made in terms that differed from those in which the draft instrument had been exhibited. Section 49 of the EPA Act in the form that it then took authorised the Director of the Department to amend the draft instrument following exhibition and “if he thinks fit” publicly

exhibit the amended instrument prior to recommending its making by the Minister. No exhibition of the amended draft regional plan had been undertaken. The difference between the provisions of the draft regional plan as exhibited and the regional plan as made were described by Priestley JA as being "stark" (at 86) and "significant" (at 87). Ultimately, his Honour embraced the test advanced on behalf of the applicant Council in challenging the validity of the regional plan to the effect that the power of amendment could not be exercised so as to achieve a difference "of such significance that the plan made by the Minister could not be said to be an outcome of the Pt 3 Division 3 process." The test embraced by his Honour accepted that if the provisions authorising alteration were interpreted so that the Plan able to be made by the Minister was –

"so different from the publicly exhibited draft that in some important respect it could be said to be a quite different plan, then Pt 3 Division 3 would be emptied of any substance."

156 Although the provisions of s 49 of the EPA Act, as considered in *Leichhardt (No 2)* are not identical to those found in s 68, it has been accepted that there is sufficient similarity in substance so as to render the determination applicable to the provisions of Div 4 of Pt 3 of the EPA Act as they relate to the making of local environmental plans (*Vanmeld Pty Ltd v Fairfield City Council* [1999] NSWCA 6; (1999) 46 NSWLR 78; *John Brown Lenton & Co Pty Ltd v Minister for Urban Affairs and Planning* [1999] NSWLEC 213; (1999) 106 LGERA 150; *Bryan v Lane Cove Council* [2007] NSWLEC 586; (2007) 158 LGERA 390 at [21]).

157 The Minister accepts that the Panel's power to make amendments pursuant to s 68(3) without re-exhibiting the amended draft under s 69(3B) was circumscribed by the principles laid down by the Court of Appeal in *Leichhardt Council v Minister for Planning (No 2)*". He acknowledged that the power of alteration could only be made if kept within the confines of the process required to be undertaken and observed in Div 4 of Pt 3 of the EPA Act. However, as the Minister submits, the power to make alterations

to a draft local environmental plan under s 68(3) is an important aspect of the public participation process.

158 I accept that this is so and I also accept that it cannot have been a purpose of the legislation to require re-exhibition of a draft local environmental plan following each and every alteration made to that draft in response to a consideration of public submissions. There is a balance to be achieved between a response to submissions received by exercising the power of amendment and the need to ensure that the end product in the form of the statutory instrument is not so different "in important respects" from the draft instrument that has been exhibited. The determination as to where this balance lies involves a consideration of the amendments and their significance in the context of the instrument as a whole.

159 The changes identified by the applicant as giving rise to this ground of challenge are summarised in the following paragraphs –

(i) The exhibited draft Centres LEP had proposed to zone lands identified below either for residential or business purposes with stated limitations upon the minimum lot size for subdivision, maximum permissible building heights and maximum floor space ratios. The Centres LEP, as made, removed or amended some or all of these controls. The lands affected are as follows:

(a) the Ravenswood College site at Gordon;

(b) the Pymble Ladies College site at Pymble;

(c) the Roseville College site at Roseville;

- (d) the site of Corpus Christie College at St Ives;
- (e) the Masada College site at St Ives;
- (f) the site of the electricity substation on the Pacific Highway at Turramurra;
- (g) the site of the electricity substation on Mona Vale Road at St Ives;
- (h) the site of the electricity substation on the Pacific Highway at Pymble;
- (i) the site of the electricity substation on the Pacific Highway at Lindfield.

The claims in relation to these sites are closely related to the sixth ground of challenge directed to changes made to the draft Centres LEP by the Minister. It will be necessary to address these matters in more detail shortly.

- (ii) The exhibited draft Centres LEP identified land throughout each of the centre areas as being "High Biodiversity". In respect of lands so identified development described as "exempt or complying development" could not be carried out. The Centres LEP as made removed this limitation upon exempt and complying development by removing the identification of areas of land as being of "High Biodiversity". It will be necessary to address this matter further.
- (iii) The exhibited draft Centres LEP identified a heritage conservation area apparently known as "Gordon Park"

as a result of which heritage control upon development of land so identified applied. The Centres LEP, as made, removed some 13 properties or lots from the area so identified with the result that the planning controls for those lots removed from the heritage conservation area categorisation attracted different and less stringent development controls upon them.

- (iv) The properties at Nos. 4, 4a, 6, 6a, 8 10, 10a Beaconsfield Parade; 2, 2a, 4, 6, 8, 8a Drovers Way and 9a Gladstone Parade, all in Lindfield, were amended from zone R3-Medium density residential to R4-High density residential; The zoning in the draft LEP permitted a maximum height of 11.5m (equivalent to 3 storeys) on these properties. The zoning under the Centres LEP permits 17.5m (equivalent to 5 storeys).
- (v) The lots at 2, 2a Yarrabah Avenue and 1 and 3 Cecil Street, Gordon were changed from Low Density residential to High Density Residential zones. The zoning in the draft LEP permitted a maximum height of 9.5m (equivalent to 2 storeys). The zoning under the Centres LEP permits 17.5m (equivalent to 5 storeys).
- (vi) The following sites were rezoned in the Centres LEP to allow dual occupancy, where previously the draft had identified that no dual occupancy was to be permitted anywhere within the area covered by the plan:
 - (i) 7 Burgoyne St, Gordon
 - (ii) 2 Forsyth St, Killara

- (iii) 15 Highfield Road, Lindfield
- (iv) 2 Highgate Road, Lindfield
- (v) 8 Provincial Road, Lindfield
- (vi) 21 and 51 Treatts Rd, Lindfield
- (vii) 2 King St, Pymble
- (viii) 14 Orinoco St, Pymble
- (ix) 29 Telegraph St, Pymble
- (x) 2 Collins St, St Ives
- (xi) 149 Mona Vale Rd, St Ives
- (xii) 20 Brentwood Ave, Turramurra
- (xiii) 2 Denman Rd, Turramurra
- (xiv) 34 Eastern Rd, Turramurra
- (xv) 1 & 4 Laurel St, Turramurra

- (vii) The Senior Citizens Centre in Turramurra was designated a Public Recreation (RE1) zone in the draft but was changed to a Local Centre B2 zone by the Panel. No development would have occurred on this site according to the zoning in the draft LEP, however, the final zoning in the Centres LEP permits a substantial scale of development involving a mix of retail, commercial, residential and associated community facilities, with a permitted development of 17.5m maximum building height (equivalent to 5 storeys).

160 ~~The Minister accepts that these changes were made. Indeed, the changes~~
relied upon by the applicant are not exhaustive of all changes that were

made. However, the Minister contends that all changes identified by the applicant were made as a result of submissions received following exhibition of the draft instrument. As I have already indicated, it will be necessary to consider some of these amendments in more detail in order to address their significance.

Amendment to the control on school sites and electricity substations

161 There are five private school sites and four sites owned by Energy Australia that are the subject of the first of the amendments that I have identified as founding the applicant's present ground of challenge. In order to understand the competing submissions of the parties, it is necessary to recite further facts.

162 At the time of preparing the draft Centres LEP each of the school sites was zoned "5. Special Uses A (School)" under the *Ku-ring-gai Planning Scheme Ordinance (the KPSO)*. The land use table applicable to land so zoned effectively constrained its use to that of school and development that might be seen to be ancillary to that use. There were no constraints imposed in the form of minimum lot size upon subdivision, building height or floor space ratio of any new development.

163 One of the electricity substations owned by Energy Australia was zoned residential 2(d)(3) under the KPSO while the remaining three sites were the subject of business zoning under the same instrument. A minimum lot size for subdivision of the residentially zoned land applied and all four sites were subject to height and floor space ratio controls.

164 *State Environmental Planning Policy (Infrastructure) 2007 (the Infrastructure SEPP)* came into effect on 1 January 2008. It is a detailed planning instrument making provision for 25 types of infrastructure including schools ("educational establishments") and for electricity transmission and distribution facilities. Following the commencement of operation of the Infrastructure SEPP, the Department of Planning issued a

Practice Note so as "to provide guidance to councils on zoning public infrastructure land in standard local environmental plans." One of the "principles" identified in the Practice Note was that in formulating new local environmental plans, land on which existing infrastructure was located should generally be zoned in the same manner as is the adjoining land, provided that zone is a "prescribed zone" within the meaning of the infrastructure SEPP that permits that type of infrastructure.

165 It was in the context of this Practice Note that the draft Centres LEP as it relates to the school and substation sites came to be prepared. As exhibited, the draft Centres LEP showed each of the school and substation sites to be zoned in the same manner as the immediately adjoining land. Each of Ravenswood College, Corpus Christi College and Masada College were zoned "R4 High Density Residential" while Pymble Ladies College and Roseville College were each zoned "R2 Low Density Residential". The electricity substation at St Ives was zoned "R4 High Density Residential", the substation at Pymble zoned "R3 Medium Density Residential" while the substation sites at Turramurra and Lindfield were each zoned "B2 Local Centre", a business zone. Clauses 4.1, 4.3 and 4.4 of the draft instrument imposed minimum subdivision lot size, height controls and floor space ratio control on each of these parcels of land. In each case the primary control was achieved by reference to the manner in which the individual lot or parcel was coloured on a map identified in the respective clauses as a "Lot Size Map", a "Height of Buildings Map" and a "Floor Space Ratio Map". Those maps form part of and were exhibited with the draft Centres LEP.

166 Apart from the primary limitation imposed by reference to the respective maps, each of the clauses controlling lot size, height of building and floor space ratio imposed additional limitations which, in the case of building height and floor space ratio related to the site area upon which any proposed development was intended to be undertaken.

167 Following exhibition of the draft Centres LEP, submissions were made to the Panel by or on behalf of each of the schools and Energy Australia. All of the schools objected to the proposed residential zonings and requested that their respective sites be the subject of the special purpose zone nominated in the planning instrument as "SP2 Infrastructure". They indicated acceptance of the limitations upon development imposed by the land use table applicable to the SP Infrastructure Zone but did not wish to be subject to the standards for development imposed by cll 4.1, 4.3 and 4.4 of the exhibited draft instrument.

168 Energy Australia also sought imposition of the SP2 Infrastructure Zone upon its four sites. It submitted that as there was no present intention to use these sites other than for the purpose of electricity substations, there should be a clear indication given to local residents that these sites would continue to be so used.

169 In their May 2009 Report to the Panel, the officers of the Council responsible for its preparation recommended that the zoning of each of the school and substation sites be changed to SP2 Infrastructure. This recommendation was accepted by the Panel and the draft instrument then provided to the Department of Planning reflected that amendment. As a result of the Panel's amendment the respective lot size, height of buildings and floor space ratio maps were amended so as to remove any colour over the SP2 sites indicating that the controls otherwise represented by those maps had been removed.

170 Prior to the submission of a report to the Minister under s 69 of the EPA Act, representations were made to the Panel on behalf of the Department of Planning. The Department drew attention to the infrastructure SEPP and the Practice Note to which I have earlier referred. It was indicated on behalf of the Department that the Infrastructure SEPP and Standard Instrument, the latter being the template for all future planning instruments, "are to be implemented State-wide with the consequence that the zoning of school sites is intended to conform with the requirements of the practice

note" in that school sites should generally be zoned conformably with the zoning on adjoining land.

- 171 The panel acceded to this submission from the Department of Planning. The report prepared under s 69 by the Panel as delegate of the Director-General and submitted to the Minister in December 2009 attached the draft Centres LEP with the zoning of the school sites and substation sites showing the residential and business zoning that had applied to them at the time of exhibition of the draft instrument. While the land zoning map pertaining to each parcel of land maintained the exhibited zoning, the lot size, height of buildings and floor space ratio maps left each of the sites uncoloured.
- 172 Relevant to all the sites in question, this is the form in which the Centres LEP was made by the Minister in May 2010. In the result, the controls on lot size, building height and floor space differed markedly from that which had been the subject of public exhibition. The extent of difference needs to be understood in the context of each of the three relevant controls.
- 173 Part 4 of the Centres LEP is headed "Principal Development Standards". Clause 4.1 addresses minimum subdivision lot size. However 4.1(2) provides that the –

"clause applies to a subdivision of any land shown on the Lot Size Map that requires development consent and that is carried out after the commencement of this Plan."

The Lot Size Map for each Town Centre area identifies different minimum lot sizes according to the manner in which land is coloured on the map. There is no minimum of size indicated for land that is uncoloured on the map. As a consequence, there is presently no specified control on the minimum lot size for subdivision of any of the school or substation sites.

- 174 Under the exhibited draft Centres LEP the minimum lot size for subdivision of Ravenswood College, Corpus Christie College and Masada College at

St Ives was 1200 square metres. The minimum lot size for Pymble Ladies College and Roseville College sites was 930 square metres.

- 175 Clause 4.3 of the Centres LEP made provision for the height of buildings. By subclause (2) it was provided that –

"The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

- 176 Again, the relevant map for each town centre area indicated by colours the maximum building height for land within that area. No maximum building height was identified for land that was uncoloured. While subclause (2A) identified a maximum height of building on land zoned R4 High Density residential, it did so in respect of land having an area of less than 2,400 square metres. It is accepted that with the exception of one of the electricity substation sites, all other sites in question exceed 2,400 square metres in area. The consequence is that there is no present height control on building on those sites.

- 177 Under the exhibited draft Centres LEP the building height maps showed that the maximum building height for the Ravenswood College, Corpus Christi College and Masada College sites was 17.5 metres or 5 storeys while for the Pymble Ladies College and Roseville College sites it was 9.5 metres or 2 storeys.

- 178 Clause 4.4 of the Centres LEP made provision for floor space ratio controls. By subclause (2) the maximum floor space ratio for a building was not to exceed the floor space ratio shown for the land on the floor space ratio map. Following the pattern of plan marking earlier described, ratios were expressed only for those lands coloured by distinctive colouring. No maximum was stipulated by reference to the legend on the map for uncoloured land. However, subclauses (2A) and (2B) have the potential to impose a floor space control in respect of some of the sites presently being considered. Subclause (2A) operates by way of exception

to the limitations imposed by the map, indicating that in respect of land zoned R2 Low Density Residential, where a site exceeded 1700 square metres then the floor space ratio is 0.3:1. That floor space control 0.3:1 does apply to the Pymble Ladies College and Roseville College sites.

179 Subclause (2B) of cl 4.4 of the Centres LEP imposed a maximum floor space ratio for development on land in the R4 High Density Residential zone. However, the restriction contained in that subclause only extended to sites that were less than 2,400 square metres in area. Each of the Ravenswood College, Corpus Christi College and Masada College sites exceeded that area so that although zoned R4 High Density Residential there was no floor space control imposed upon them.

180 The floor space ratio map forming part of the exhibited draft Centres LEP then needs to be noticed. For the Pymble Ladies College and Roseville College sites, the map indicated a maximum floor space ratio of 0.3:1 with the result that the control is unchanged in the instrument as made. In respect of the Ravenswood College, Corpus Christi College and Masada College sites, the maximum floor space ratio indicated by the map was 1.3:1.

181 In focusing upon the differences in the controls operating upon the private school sites, I do not overlook the impact upon the electricity substation sites. Development upon the latter sites is unconstrained by reason of their being uncoloured on the relevant maps and also because the qualifications expressed both as to height and floor space in Pt 4 of the Centres LEP does not operate in respect of two of the four sites that are zoned B2 Local Centre or the site that is zoned R3 Medium Density Residential. The evidence does not establish whether the fourth substation site at St Ives that is zoned R4 High Density Residential was of an area that would attract the floor space ratio limitation imposed by cl 4.4(2B).

182 As will be apparent from the location indicated for each of the school and substation sites, they are spread among the six town centre areas that are the subject of the Centres LEP. Moreover, the sites, particularly the school sites, are large sites that, ownership aside, have potential for significantly increased development conformable with the land use and development controls, such as they are, presently applying to them.

183 It is noteworthy that when making a submission to the Department of Planning, seeking to justify the imposition of the SP2 Infrastructure zone for all of these sites, the Council's Director of Strategy considered that the school sites were "large complexes or strategic sites" within the meaning of the description used in the Practice Note to which I have earlier referred. When responding to that submission, the author of the Department of Planning's representations took issue with the submission that the school sites were large complexes or strategic sites within the meaning of the Practice Note, although it was acknowledged that some of the sites covered "relatively large land areas and are important in the context of local economic activity". These statements give some force to the submission that the sites were important and therefore the amendment to planning controls in respect of them significant in the context of the Centres LEP.

184 The Minister recognised the potential significance of the alterations between draft instrument and the instrument ultimately made by reason of the matters presently being considered. However, the submission made on his behalf is that the omission of the development controls I have identified from the school and substation sites is "so patently absurd" that it must manifest a mistake which would be apparent. Indeed, it is urged that because the Centres LEP, as made, fails to give effect to the intentions of those who prepared it that its literal meaning "should be departed from to give effect to that intention." Reliance is placed upon the judgment of Mason and Wilson JJ in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* where their Honours said (at 321):

"...when the judge labels the operation of the statute as 'absurd', 'extraordinary', 'capricious', 'irrational' or 'obscure' he assigns a ground for concluding that the Legislature could not have intended such an operation and that an alternative interpretation must be preferred. But the propriety of departing from the literal interpretation is not confined to situations described by these labels. It extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions."

185 Reliance is also placed upon observations to similar effect by members of the High Court in *Minister for Immigration and Citizenship v SZJGV* [2009] HCA 40; (2009) 259 ALR 595. In the joint judgment of French CJ and Bell J, their Honours stated that an irrational result from the interpretation of legislation may be avoided by departure from the literal or natural and ordinary meaning of the text (at [9]). Their Honours continued:

"The limits of the judicial role, as pointed out by Lord Nicholls, require that the courts 'abstain from any course which might have the appearance of judicial legislation'. Three matters of which the court must be sure before interpreting a statute in this way were the intended purpose of the statute, the failure of the draftsman and parliament by inadvertence to give effect to that purpose, and the substance of the provision parliament would have made. The third of these conditions was described as being of 'crucial importance'. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation."

186 While these statements of principle are relevant to the interpretation of legislative provisions, they must, in my opinion, be applied with some caution if, as the Minister seeks to do, reliance is to be placed on the history of amendment that I have recited. A consideration of the provisions of the Centres LEP, when applied to the subject sites, do not necessarily speak of irrationality. As the cases cited on behalf of the Minister state, the starting point for application of the principles to which they direct attention is the language of the statute or statutory instrument itself.

187 It is to be remembered that the sites in question are all large sites. The Centres LEP is not a municipality wide local environmental plan but rather

one confined to the environs of the six centres to which it applies. The school sites together with some of the substation sites are, in the context of the lands that are the subject of the Centres LEP, significant in size. It does not seem to me therefore to be wholly irrational to contemplate that a large parcel of land, identified by the fact that it is uncoloured on the development standards maps, should not have those controls imposed upon them, allowing, by reason of their size, greater latitude of allotment size, building height or floor space ratio than is applicable to other land holdings. While an endeavour is often made to give practical effect to a planning instrument when its operation is unclear (*Hecar Investments No 6 Pty Ltd v Lake Macquarie Municipal Council* (1984) 53 LGRA 322) that practical effect needs to be consistent with the language of the planning instrument. Also to be borne in mind, in the context of a submission that an absurd result is achieved by the manner in which the Centres LEP operates in respect of the subject sites, is the observation by Tobias JA in *Calleja v Botany Bay City Council* [2005] NSWCA 337; (2005) 142 LGERA 104 (at [25]) that "any attempt to always find planning logic in planning instruments is generally a barren exercise". His Honour's observation has since been embraced more than once (see, for example, *Cranbrook School v Woollahra Council* [2006] NSWCA 155; (2006) 66 NSWLR 379 per McColl JA at [62]).

- 188 The Minister submits that the failure to reinstate the control upon development on the school and substation sites should be apparent from the report prepared on behalf of the Panel pursuant to s 69. It requested the making of the instrument, indicating its desire to comply with the Practice Note as the reason for reverting to the exhibited zoning. No reason was given for failing to reapply the development controls by recolouring the relevant maps. He also contends that there were no submissions received by the Panel seeking to have the development controls removed. Their removal was only contemplated in the context of the land being rezoned to the SP2 Infrastructure zone.

189 I accept that no submission was made to the Panel as to the imposition of development standards if residential and business zonings were to be maintained for the sites. However, it seems to me that the prime purpose of maintaining these zonings was to comply with the Practice Note. It was the submission from the Department of Planning which appears to have prevailed upon the Panel to maintain the advertised zones. As I read it, the Practice Note is directed to achieving land use controls upon existing infrastructure sites that are consistent with those land use controls applicable to adjoining land. It is, in general terms, land use to which a zoning is directed. Development controls or standards are ordinarily directed to the quantitative or qualitative aspects of land use that is otherwise permissible in a particular zone. The Practice Note is silent upon the imposition of those development controls.

190 Indeed, it would usually be the case that sites used or intended to be used for schools would be larger in area than those allotments or parcels of land surrounding it, at least in an urban context. As I have earlier suggested, it would not appear to me to be "absurd" or to bespeak obvious error to contemplate the absence of such controls for large sites, affording greater discretion to the consent authority when contemplating the grant of consent for permissible development. An endeavour to achieve removal of building height and floor space constraints at a prescriptive level cannot be dismissed as matters informing the submission made to the Panel on behalf of the schools in the present case when seeking imposition of the SP1 Infrastructure zone. By way of example, submissions made to the Panel on behalf of both Pymble Ladies College and Ravenswood College indicated as much in terms.

191 The Minister also submits that error is apparent having regard to the objects stated in cl 1.2 of the Centres LEP and the objectives of Pt 4 of the instrument which, as I have earlier indicated, identifies the "principal development standards". The aims of the Centres LEP are expressed in cl 1.2(2) in the following terms –

"(2) The particular aims of this Plan are as follows:

- (a) to establish a hierarchy of centres for Ku-ring-gai,
- (b) to facilitate the development of the centres to enhance Ku-ring-gai's economic role and cater to the retail and commercial needs of the local community,
- (c) to provide a variety of housing choice within and adjacent to the centres,
- (d) to protect, enhance and manage land having special aesthetic, ecological, social, cultural or conservation values for the benefit of present and future generations."

These aims are expressed at such a level of generality that, read objectively, they could not identify the error which the Minister claims is apparent from them.

- 192 Each of the provisions of Pt 4 of the Centres LEP directed to subdivision lot size, height of buildings and floor space ratio commence with the expression of an objective that each provision is intended to achieve. I do not quote those objectives but suffice to note that a consideration of them again reveals that they are each expressed at a level of generality such that they would not identify to the objective reader apparent error by the omission of the controls upon the subject sites that they otherwise seek to impose.
193. Contrary to the submission made on behalf of the Minister, for the reasons that I have indicated, the three matters identified in the passage earlier quoted from the joint judgment of French CJ and Bell J in *SZHG* as necessary to be satisfied before interpreting the instrument in a way that does not reflect its terms have not been established. To do as the Minister seeks to do would, to my mind, give the appearance of imposing judicial legislation rather than embarking upon a course of interpretation.
- 194 In the result, the Centres LEP should be interpreted according to the terms in which it was made. It should not be interpreted as if the omission is so potent that the standards imposed by Pt 4 of the Instrument should be applied as if the relevant maps were coloured in the manner shown on the

maps exhibited with the draft instrument. This has the consequence that there is a difference of significance between the draft Centres LEP as exhibited and the Centres LEP as made.

195 Against the possibility that I determined this issue as I have, the Minister nonetheless submits that the Centres LEP should not be seen as "quite a different instrument" from the exhibited draft Centres LEP. He points to a number of matters that support this proposition. They are, in summary:

- (i) some of the development controls may still apply to some of the sites;
- (ii) other than for exempt or complying development, any development on the sites will require the grant of development consent thereby invoking those discretionary considerations applicable to the determination of such an application under the EPA Act;
- (iii) the *Ku-ring-gai Development Control Plan (Town Centres) 2010 (the DCP)* will apply, pursuant to which a number of matters controlling development will need to be considered; and
- (iv) the Centres LEP itself in cl 4.6 provided a discretion to impose heights different from those that were the subject of the specific controls.

196 When considering the Minister's submission, it is necessary to keep firmly in mind that, in the context of the residential and business zones applicable to the subject sites, the identity of the present owners and the particular form of their present use is irrelevant. It is the manner in which each of the draft Centres LEP and the Centres LEP, as made, sought to regulate development upon the sites that is important to be noticed.

- 197 A comprehensive response to the Minister's submission is, I believe, appropriate to be given. The reader of the exhibited draft Centres LEP would recognise that permissible development of the sites in accordance with the respective zoning tables was subject to the prescriptive controls expressed in Pt 4 of the draft instrument. So understood, those controls would inform any submission that the reader might seek to make to the Panel consequent upon exhibition. The interested reader may also have become aware that other discretionary considerations would apply in a given case but the primary prescriptive control remained central to the consideration of those provisions.
- 198 The removal of that prescriptive control from the Centres LEP, as made, has a different legal and practical consequence from that which would flow from the draft. To apply the observations of Priestley JA in *Leichhardt No 2* (at 88), "it made the planning law substantially different" from that which had been the subject of public exhibition (cf *Bryan v Lane Cove Council* at [22]). This substantial difference was not alleviated by the fact that other discretionary considerations may be invoked to achieve a result that mollifies the absence of those prescriptive controls.
- 199 The DCP provides an example supporting this conclusion. It commenced, not at the time of making of the Centres LEP, but some two weeks later. The Centres LEP does not, in terms, identify any of its provisions as being dependent for their operation and effect upon a development control plan. The development control plan addresses aspects of particular forms of development but not those directly addressed in Pt 4 of the Centres LEP. Moreover, the matters to be addressed in accordance with the provisions of the DCP do not impose the same constraint upon development as do the prescriptive requirements of the statutory instrument itself (*Zhang v Canterbury City Council* [2001] NSWCA 167; (2001) 51 NSWLR 589 at [74] – [75]).
- 200 Clause 4.6 of the Centres LEP does afford a discretion to the consent authority to vary the relevant prescriptive controls imposed by Pt 4. The

provisions of that clause are expressed in terms almost identical to those found in *State Environmental Planning Policy No 1- Development Standards* a policy that is expressly excluded by cl 1.9 as operating in respect of the land to which the Centres LEP applies. The provisions of cl 4.6 impose a layer of control that considerably constrains the capacity to achieve any exceedance of the prescribed standard (*Wehbe v Pittwater Council* [2007] NSWLEC 827; (2007) 156 LGERA 446 at [36] ff). The existence of this provision in the draft Centres LEP does not, to my mind, detract from the significant difference between the exhibited draft instrument as proposed to apply to the subject sites and the manner in which the Centres LEP now operates in relation to permissible development on those same sites. I will consider in due course the consequence of this difference for the validity of the Centres LEP.

Biodiversity constraints

- 201 Clause 6.6 of the exhibited draft Centres LEP was headed "Land of high and special ecological value – Biodiversity". By subclause (1) the clause is expressed to apply to land identified on a biodiversity map as "high biodiversity significance" and "special biodiversity significance" (**the Biodiversity Map**). Subclause (2) identifies general objectives of the clause while subclauses (3) and (4) identify specific objectives for development on land identified as "high biodiversity significance" and "special biodiversity significance" respectively. By subclause (5) the consent authority is constrained from granting development consent to development on land to which the clause applies unless it first considers the impact of development on matters identified in the clause while subclause (6) constrains development unless the consent authority is satisfied as to a number of matters identified in that clause.
- 202 The Biodiversity Map for each of the town centre areas identified tracts of land within each area which was coloured either dark green or light green. According to the legend of the map, those areas coloured dark green were identified as of "high biodiversity significance" while those coloured light

green were identified as special biodiversity significance". The extent of land so indicated varied among the centre areas. The area so indicated for both the Turrumurra and Pymble centre areas was significant in its areal extent with lesser areas indicated for the other centres. In all cases, the dark green colouring, indicating high biodiversity significance, was far greater in area by comparison with that indicating areas of special biodiversity significance.

203 Part 3 of the exhibited draft Centres LEP addressed exempt and complying development. The purpose of the Part was to identify by reference to schedules to the instrument that which was exempt development and that which was complying development. Under s 76 of the EPA Act, exempt development was able to be carried out without the need for development consent to be obtained for it. Pursuant to s 76A(2) development consent for complying development is obtained by securing the issue of a complying development certificate. It does not require the determination by a consent authority to grant development consent.

204 Subclause (1) of cl 3.3 (within Pt 3 of the draft Centres LEP) provides that exempt or complying development must not be carried out on any "environmentally sensitive area for exempt or complying development." Subclause (2) relevantly provides as follows:

"(2) For the purpose of this clause:
environmentally sensitive area for exempt or complying development means any of the following:

- ...
- (g) land identified in this or any other environmental planning instrument as being of high Aboriginal cultural significance or high biodiversity significance, ...".

It is accepted that the effect of cl 3.3 was that exempt or complying development could not be carried out on those areas identified on the biodiversity map as being of "High Biodiversity Significance".

- 205 The Centres LEP, as made, does not embrace the nomenclature of the draft. Clause 6.5 of the Centres LEP is headed "Natural resources sensitivity – biodiversity". By subclause (2) the clause is expressed to apply land identified as "Areas of Biodiversity Significance" on the "Natural Resources Sensitivity – Biodiversity Map" (**the Natural Resources Sensitivity Map**). The relevant map for each centre area is marked with a single green colour with the legend indicating that the areas so marked are of "Biodiversity Significance". Clause 6.5 does not, in terms, identify the biodiversity areas as being either high or special. No adjectival quality is given to the biodiversity significance either in form or substance.
- 206 Clause 3.3 of the Centres LEP is in the same form as the exhibited draft instrument. Subclause (1) excludes exempt or complying development from being carried out on any "environmentally sensitive area for exempt or complying development" and that latter phrase continues to be defined in the same term as it was in subclause (2) of the draft. Relevantly, paragraph (g) of the subclause remains in the same terms so that in order to engage its provisions it is necessary to identify land that by this or any other planning instrument is of "High Biodiversity Significance".
- 207 For the reasons that I have indicated, the Centres LEP does not identify any land that meets the description in paragraph (g) of cl 3.3(2). In consequence exempt and complying development may be carried out, either without consent or with the issue of a complying development certificate on land identified in the instrument as being of biodiversity significance. It is this difference that is relied upon by the applicant in order to sustain the present ground of challenge. In so doing, it not only relies upon the fact of different nomenclature but its consequence for the area of land within the town centres upon which development exhibited as being proscribed may now be carried out.
- 208 I do not understand the Minister to take issue with the interpretation exercise that I have just reflected. However, he submits that other factors need to be brought to bear in considering whether the difference between

the exhibited draft instrument and that finally made is a difference of significance.

209 *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (the Codes SEPP)* commenced on 27 February 2009, that is, after the close of exhibition of the draft Centres LEP. The stated purpose of the Codes SEPP was to bring into effect during a transitional period uniform codes that identified both "exempt development" and "complying development". It did not proscribe provisions of a local environmental plan that identified both exempt and complying development. Indeed, that is what the Centres LEP did in Pt 3, in terms similar to those contained in the same Part of the draft exhibited instrument.

210 It is submitted by the Minister that the introduction of the Codes SEPP changed "the regulatory landscape" in the context of which the Centres LEP is to operate. While in principle this may be so, it is necessary to consider the extent to which that "regulatory landscape" was changed. Relevantly, cl 1.19 of the Codes SEPP required that to be exempt or complying development, that development must not be carried out on land that is "an environmentally sensitive area". The latter expression is defined in cl 1.5 of that Policy in terms that are identical to the provisions of cl 3.3(2) of the Centres LEP. Relevantly, paragraph (g) is common to both instruments so that in order to exclude the carrying out of exempt or complying development upon land it is necessary that it be identified in a planning instrument as being of "high biodiversity significance". As no planning instrument has been identified that identifies land indicated having that quality, the Codes SEPP does not reintroduce the prohibition that was contained in the exhibited draft instrument.

211 The Minister contends that the change between the exhibited draft instrument and the instrument as made is, having regard to the biodiversity provisions and mapping in each, of minimal significance. He relies upon the following matters:

- (i) within some of the mapped areas of biodiversity significance are species or communities of vegetation that are protected under the *Threatened Species Conservation Act 1995*;
- (ii) development can only qualify as exempt development if it is of "minimal environmental impact (s 76(2) EPA Act)";
- (iii) by reference to the provisions of Div 1 of Pt 2 of the Codes SEPP only minor development, unlikely to have significant impact on vegetation, is identified as exempt development;
- (iv) complying development must be of a type that is permissible with consent in the land use zone applying to the land in question;
- (v) carrying out of complying development is proscribed on land that is critical habitat (s 76A(6) of the EPA Act, as at 27 May 2010) and some, but not all forms of complying development upon lands zoned E2 Environmental Conservation or E4 Environmental Living (Div 1 of Pt 3 of the Codes SEPP);
- (vi) tree removal is regulated by cl 5.9 of the Centres LEP as well as Pt 8 of the DCP;
- (vii) exempt and complying development must not involve the removal or pruning of a tree without a permission or consent so to do where such permission or consent is required; and

- (viii) no tree removal may be undertaken without consent in a Heritage Conservation Area (cl 5.10 of the Centres LEP).

212 It is to be observed that except for the those provisions of the Codes SEPP, identified by the Minister, the other matters identified by him also applied had the Centres LEP taken the form of the advertised draft. Clauses 5.9 and 5.10 of the draft Centres LEP are identical to the same clauses that are contained in the statutory plan. The DCP was intended to have application to the regulation of tree removal in both the draft and final forms of the statutory instrument. Other legislation that controls the impact upon certain trees, whether individually or as part of a community, such as the *Threatened Species Conservation Act*, applied whether the instrument took the form of the draft or the form in which it was made. Further, the provisions of the EPA Act, so far as they bear upon exempt and complying development (ss 76 and 76A) applied, whichever form the instrument took.

213 Schedule 2 to the exhibited draft Centres LEP identified development that was exempt development. Although not identical in its terms, the substance of that Schedule seems largely to accord with the provisions of Pt 2 of the Codes SEPP. The provisions of Schedule 3 to the draft instrument, identifying complying development, had been removed from the instrument as made. Moreover, the terms of the Codes SEPP identify complying development in a way that differs from the manner in which such development is identified in Schedule 3 to the draft Centres LEP. However what is relevant for present purposes is that the provisions of cl 1.16 and 1.18 of the Codes SEPP, relating to exempt and complying development, in order to satisfy that description, must not involve the removal or pruning of trees without consent or approval where such consent or approval is required, essentially reflects the provision of cl 5.9 of both the draft and final Centres LEP. In as much as certain forms of development cannot qualify as complying development in zones E2 and E4 by reason of the provisions of Pt 3 of the Codes SEPP, an examination of the Biodiversity Map would indicate that those areas identified in the

draft instrument as being "High Biodiversity Significance" were far more extensive in area than those relatively small sections of each Centre Area that is zoned either E2 or E4.

214 Upon this analysis, the matters relied upon by the Minister are essentially neutral upon the comparison between the Centres LEP and the draft Centres LEP as exhibited. The fact remains that under the Centres LEP, as made, there are vegetated tracts of land within each centre area upon which exempt and complying development may now be carried out but which could not be carried out had the draft exhibited plan become law. It may be that, by operation of regulatory provisions identified by the Minister, but not contained in the Centres LEP itself, some of that land would not be legally susceptible to development of that kind even without the designation of "High Biodiversity Significance". However, faced with the comparison between the provisions of the exhibited draft instrument (including the relevant maps that form part of it) and the provisions of the instrument, as made, the diminished biodiversity controls in the latter appear to me to be significant. Particularly is this so when regard is had to the aggregate area of land within the Centres to which that diminished control applies. While a cabana or greenhouse ("exempt development") or development for earthworks and drainage in accordance with the requirements of the complying development standards of the Codes SEPP may be development that, on an individual allotment only has minimal environmental impact, if development of that kind is repeated on lots in the relatively closely settled areas shown on the maps to the statutory instrument, then it cannot be gainsaid that, collectively, development so categorised has the potential to impact upon vegetation or areas identified as having high biodiversity significance.

215 It follows that this difference between the exhibited draft Centres LEP and the Centres LEP, as made, is relevant to my determination as to whether the latter is "quite a different instrument" from the former. Again, that is a matter to which I will turn in due course.

Reduction in the Gordon Park heritage conservation area

- 216 Clause 5.10 of the Centres LEP, both in draft and as made, contains special provisions directed to development of land contained within a heritage conservation area. Such an area is defined as meaning an area of land shown on the Heritage Map forming part of the instrument.
- 217 The map showing heritage conservation areas for the Gordon town centre area identified some 19 properties bounded by Macintosh Street, Worona Avenue and Forsyth Street at Gordon. As with all areas similarly identified, cl 5.10 imposed more stringent controls for development assessment on lands so identified than was the case for land outside the heritage conservation area, albeit zoned in the same manner as land within that area.
- 218 When the Centres LEP was made the area identified as being a heritage conservation area in this part of Gordon was diminished. It now comprises only 7 of the original 19 lots that, on exhibition, had constituted the heritage conservation area. That had the effect that development on the 12 lots removed from the heritage designation could be undertaken in a way that no longer reflected the strictures on development assessment that would otherwise have applied.
- 219 In a local context, the removal of this constraint, without the opportunity for those who might have taken a different course in relation to the draft instrument had they reason to anticipate removal, would seem to be a matter of some significance. Whether, when considered in the context of the Centres LEP as a whole, it would be significant is debateable. However, when considered in the context of other alteration between draft and the instrument made by the Minister, the significance of the alterations is maintained.

Other amendments made by the Panel

- 220 The remaining three matters identified in [159] as demonstrating alteration between the exhibited draft Centres LEP and the Centres LEP, as made, require no further discussion. The summary of alterations there contained is sufficient for present purposes.
- 221 While those alterations may, on an individual site basis, not be seen as significant, the cumulative impact of the alterations is necessary to be considered. While it can be accepted that the power of alteration is available under s 68 of the EPA Act, without the necessity for re-notification of an amended draft instrument, the extent and nature of alterations necessarily inform the determination as to whether the instrument, as made, is the outcome of the process for making a local environmental plan mandated by Div 4 of Pt 3 of the EPA Act.
- 222 Before turning to resolve this issue it is appropriate to consider, albeit out of order, the ground of challenge made by the applicant directed to amendment of the draft Centres LEP by the Minister. It is to that ground I now turn.

Ground (vi): amendments made by the Minister

- 223 Masada College was the owner of a parcel of land at Lindfield and generally bounded by Treatts Road, Wolseley Road and the North Shore railway line. This parcel of land comprised some 20 lots and by reason of its shape is referred to in the evidence as the "Masada triangle". It was a site that included the Masada Infants and Primary School as well as a number of single detached houses.
- 224 The exhibited draft Centres LEP showed the Masada triangle land to be zoned R2 Low Density Residential. As a consequence, the maximum height of any new building on that land would have been limited by cl 4.3

of the draft instrument to 9.4 metres or two storeys and the maximum floor space ratio would have been limited by cl 4.4 to 0.3:1.

- 225 The draft instrument also identified a row of about 16 houses in Wolseley Road as a heritage conservation area. The area so identified included all properties that faced the Masada triangle site.
- 226 Following exhibition of the draft Centres LEP, the Masada triangle site was further considered by the Panel. Initially, it determined that the zoning of the site should be amended to an SP2-Infrastructure zone, consistent with the consideration to which I have earlier referred relating to private school sites. However, following upon submissions made to it on behalf of the Department of Planning, the Panel determined to maintain the original R2 zone and the instrument was submitted to the Minister with the s 69 report, recommending that the local environmental plan be made in that form. However, that did not occur.
- 227 Apparently, Masada College had, for some time, contemplated the removal of its Lindfield campus to its St Ives campus. It wished to realise the value of its land at Lindfield as part of that purpose. As it was entitled to do, the college made representations to the Department of Planning seeking to secure a higher density zoning for the Masada triangle site. Apparently, the Panel had resisted such a zoning by reason of the existence of a critically endangered vegetation community on the site and also by reason of the fact that immediately opposite in Wolseley Road was the heritage conservation area to which I have referred.
- 228 The submission of Masada College received favourable consideration within the Department of Planning. On 18 May 2010 a supplementary report to the Minister under s 69 of the EPA Act was signed by officers of the Department, including the Director General. The report recommended that the zoning be upgraded to that of R4 High Density Residential. It is this zone that applies to the Masada triangle site under the Centres LEP. The result will be a 17.5 metre or five storey eight limit and a maximum

floor space ratio of 1.3:1. The identification of land on the opposite side of Wolseley Road as a heritage conservation area is retained.

- 229 The power of the Minister to amend a draft planning instrument submitted under s 69 is not in question. Although s 70 of the EPA Act had been repealed at the time at which the Minister made the Centres LEP on 27 May 2010, the operation of the provision as it pertained to the making of that planning instrument was preserved by cl 12 of the *Environmental Planning and Assessment Regulation 2000*. Section 70 relevantly provided as follows:

"70 Making of local environmental plan

(1) After considering the Director-General's report made under section 69, the Minister may:

- (a) make a local environmental plan:
 - (i) in accordance with the draft local environmental plan as submitted by the Council under s 68(4), or
 - (ii) in accordance with that draft plan with such alterations as the Minister thinks fit relating to any matter which in the opinion of the Minister is of significance for State or regional environmental planning,
- (b) direct that action be taken in accordance with subsection (3), or
- (c) decide not to proceed with the draft local environmental plan.

(1A) Without limiting subsection (1)(a)(ii), the alterations that may be made by the Minister relating to any matters which in the opinion of the Minister are of significance for State or regional environmental planning may comprise changes of substance to the draft local environmental plan and may arise from submissions or otherwise from the Minister's consideration of the matters in the draft plan.

(2) ...

(3) The Minister may (but need not) direct the council to publicly exhibit, wholly or in part, a draft local environmental plan that has been altered pursuant to this section or section 68, and the provisions of this section and sections 66, 67, 68 and 69 shall, with any necessary adaptations, apply to that plan.

230 There are two matters to be noticed by reference to this section. First, the discretion to publicly exhibit an amended draft instrument is in similar terms to that which a Council has under s 68(3B). The second matter of present relevance is that the Minister's power of alteration is circumscribed by the necessity that an opinion be formed as to the significance for State or regional environmental planning of the alteration in contemplation. It is not suggested in these proceedings that the Minister did not form the requisite opinion. That being so, the action taken by the Minister bespeaks the significance of the alteration. While subsection (3) would indicate that the fact of significance does not itself mandate re-exhibition of the draft instrument, the accepted significance of the subject matter of the alteration bears upon the determination as to whether the Centres LEP, as made, is truly the product of the Pt 3 Div 4 process.

Significance of alterations: Grounds (iii) and (vi)

231 As would be apparent from these reasons, the power of the Panel or the Minister to alter the exhibited draft Centres LEP in the manner they did is not in question. It is the power of the Minister to make the Centres LEP without the altered draft having first been publicly notified and the steps thereafter required to be taken by Div 4 of Pt 3 that is presently relevant.

232 In addressing ground (iii) of the applicant's claim, I have identified six aspects of alteration made by the Panel that, on their face, have significance for planning in the town centre areas. For reasons already expressed, those alterations identified as pertaining to the school and electricity substation sites, as well as those alterations pertaining to the biodiversity provisions of the instrument, seem to me, in themselves, to

support the applicant's claim. As alterations made to the draft instrument without further public notification, they seriously undermine the Division 4 process.

233 As I have also indicated, the altered zoning of the Masada triangle site is, both by reference to the power that informs the Minister's decision to alter the draft instrument and also by objective judgment, an alteration of considerable significance when comparing the intended operation of the draft instrument as exhibited with the operation of the statutory instrument ultimately made by the Minister. The objective assessment of significance in relation to that alteration is aided by the juxtaposition of the high density residential zone with the heritage conservation area immediately opposite. This is not to question the capacity of the Minister to justify such a juxtaposition as an exercise in land use planning. Rather, it is the significance of the alteration that is important for present purposes.

234 To these alterations that have been discussed in detail must also be added the further alterations to the draft Centres LEP described in [159] when addressing ground (iii) of the applicant's challenge. The applicant submits that when considered in their totality, all of the alterations made are such that in important respects the Centres LEP is not the product of the prescribed statutory process.

235 The Minister contests this conclusion. Without intending disservice to the detailed submissions made on his behalf, he contests the applicant's contentions on the following bases:

- (i) all alterations were made as a consequence of submissions received;
- (ii) the alterations affect only about 106 lots whereas there are about 3,769 lots within the aggregate area covered by the Centres LEP, although in giving this comparison it is accepted that the number of affected

lots does not take account of those lots upon which the biodiversity provisions have been altered in the manner already addressed;

(iii) in respect of about 44 residential properties, the exhibited draft has been altered to change an R4 High Density Residential zone to an R2 Low Density Residential zone while the maximum building height has been reduced in respect of a further 12 properties;

(iv) the zoning alteration made in respect of those properties identified in (iv), (v) and (vii) of [] reinstated a land use zoning equivalent to that applicable to those sites under the KPSO while the alteration directed to the sites identified in (vi) of [] restored the entitlement to dual occupancy that attached to them under the KPSO; and

(v) as it was publicly stated by the Panel at the time of exhibition of the draft Centres LEP that its purpose was to increase the density of residential and commercial development, it could hardly be complained that in some cases and in respect of a relatively small number of lots, density had been increased by alteration of the exhibited draft instrument.

236 The context in which it is necessary to consider the Minister's submissions is the important part played by public participation in the plan making process. I have earlier referred to some of the principles when dealing with ground (ii) of the applicant's claim. The significance of this process was identified by Spigelman CJ in *Vanmeld Pty Ltd v Fairfield City Council* where his Honour said (at [38]):

"the detailed scheme of consultation and public exhibition in the *Environmental Planning and Assessment Act*, makes it clear that Parliament regarded the procedural steps as of considerable significance for the integrity of the process of formulating local environmental plans."

- 237 There is no bright line that determines the point beyond which the process of alteration made pursuant to ss 68(3) or 70(1) to a draft planning instrument will require the altered draft to be re-advertised. As the authorities earlier cited make clear, the determination is made by considering the extent of difference "in important respects" between the instrument as made and the draft which was exhibited.
- 238 I do not accept that the comparison of lot numbers affected by alteration with the total number of lots covered by the Centres LEP is determinative. Lot numbers give no realistic appreciation of the area of land affected by altered controls. So much is apparent from the various maps before me which have cadastral boundaries marked on them. By way of example, the maps confirm that some of the school sites to which I have referred are substantial in area albeit comprised of only a relatively small number of lots. Moreover, the areas affected by the altered biodiversity controls have not been identified by lot numbers given their extent and the fact that there is partial impingement upon a large number of them.
- 239 The fact that alterations were made as a consequence of submissions received either by the Panel or the Minister does not bear significantly upon the determination to be made. It is the significance of the alteration that is relevant. This point is illustrated by the alteration made to the controls applicable to the Masada triangle land, an alteration made as a result of submissions received from the owner of the site.
- 240 In respect of that site, the expectation gained from the exhibited draft instrument was that residential development of the land would be limited in height to 9.4m or two storeys with a floor space ratio limitation of 0.3:1, controls identical to those applicable to the heritage conservation land

opposite. That expectation was set at nought when the instrument was altered to allow buildings up to 17.5m or 5 storeys in height with a capacity to provide floor space more than four times greater than that exhibited at 1.3:1.

241 Further, I do not place store on the submission that some of the alterations made had the effect of reinstating the zoning of the land as it was under the KPSO. This submission, so it seems to me, elides the relevant comparison to be made which, for present purposes, is between the exhibited draft instrument and that instrument ultimately made by the Minister. Once again, it is the significance of that difference that must be considered.

242 I have already expressed the opinion that a number of the alterations made to the draft Centres LEP following exhibition are individually significant. The changes made to development controls upon the school and substation sites that I have identified fall into that category. Having regard to the area of those sites and their disposition among the town centres that are the subject of the Centres LEP, those alterations assume an overall significance. They alter, in important respects, the capacity for development in all six town centre areas, particularly as they relate to the school sites that are located within the town centre areas of Roseville, Gordon, Pymble and St Ives. In the same context are the altered zoning and development controls applicable to the Masada triangle land within the Lindfield town centre area.

243 To those significant changes must be added the altered biodiversity controls already discussed and which affect tracts of land within each town centre area. One of the regulatory aims expressed in each of the draft instrument and that finally made is (cl 1.2(2)(d)) –

"(d) to protect, enhance and manage land having special aesthetic, ecological, social, cultural or conservation values for the benefit of present and future generations."

The means by which this aim was sought to be achieved in respect of ecological (biodiversity) values was altered in the manner earlier discussed and in a way that has a different consequence from that that was the subject of the exhibited draft instrument. In short, it involved an alteration in an important respect.

244 That same aim of the Centres LEP is directed to heritage conservation. I have identified the manner in which heritage protection has been altered in respect of land within each of the Gordon and Lindfield centre areas.

245 When the alterations now and earlier discussed are considered in their totality, I conclude that the Centres LEP made on 25 May 2010 was not the outcome of the Pt 3 Div 4 process. That instrument differed in important respects from the exhibited draft instrument. The applicant is therefore entitled to succeed on grounds (iii) and (vi) of its grounds of challenge.

Ground (iv): compliance with cl 10 of SEPP 19

246 The provisions of *State Environmental Planning Policy No 19 – Bushland in Urban Areas (SEPP 19)* apply to the Ku-ring-gai local government area. It is an expressed aim of the Policy to protect and preserve bushland within urban areas of those local government areas to which it applies. Clause 4(1) defines the word “bushland” in the following way:

“**bushland** means land on which there is vegetation which is either a remainder of the natural vegetation of the land or, if altered, is still representative of the structure and floristics of the natural vegetation.”

247 Clause 10 of SEPP 19 imposes an obligation of consideration when preparing a draft local environmental plan. It does so in the following terms:

“10 Preparation of local environmental plans

When preparing draft local environmental plans for any land to which this policy applies, other than rural land, the council shall:

- (a) have regard to the general and specific aims of the Policy, and
- (b) give priority to retaining bushland, unless it is satisfied that significant environmental, economic or social benefits will arise which outweigh the value of the bushland."

The applicant contends that the Panel failed to comply with the obligations imposed by this clause when preparing the draft Centres LEP.

248 The assertion by the applicant that there are substantial areas of the lands that are the subject of the draft Centres LEP on which "bushland" within the meaning of SEPP 19 is located is not in dispute. The question for determination is whether the consideration called up by cl 10 was given to this bushland.

249 In particular, the applicant draws attention to the particular requirements of cl 10 that it says were not observed. It is claimed that nowhere does any document express satisfaction "that significant environmental, economic or social benefits will arise which outweigh the value of the bushland" when it has not shown to have given priority to retaining bushland. Secondly, it says that it is not shown to have had regard to the general and specific aims of the Policy. The aims of the Policy are expressed in cl 2. Subclause (1) of that clause provides as follows:

"(1) The general aim of this Policy is to protect and preserve bushland within the urban areas referred to in Schedule 1 because of:

- (a) its value to the community as part of the natural heritage,
- (b) its aesthetic value, and
- (c) its value as a recreational, educational and scientific resource."

The applicant draws particular attention to paragraph (b) of this subclause.

250 The specific aims expressed in cl 2(2) of SEPP 19 to which the applicant draws attention are the following:

- (g) to protect bushland for its scenic values, and to retain the unique visual identity of the landscape,
- (m) to maintain bushland in locations which are readily accessible to the community, and
- (n) to promote the management of bushland in a manner which protects and enhances the quality of the bushland and facilitates public enjoyment of the bushland compatible with its conservation."

251 To demonstrate non-compliance with the requirements of cl 10, the applicant draws attention to two matters. First, the only reference in the material prepared prior to and at the time of exhibition of the draft Centres LEP was a check list of applicable SEPPs in which it had acknowledged that SEPP 19 was relevant to its preparation. This is coupled with a document attached to the report prepared on behalf of the Panel pursuant to s 69 of the EPA Act in which, by way of a tick in a box, it is indicated that the draft instrument is consistent with SEPP 19. It contends that this is "mere advertence" to the policy and in no way reflects the consideration of matters required to be considered by cl 10 (cf *Weal v Bathurst City Council* [2000] NSWCA 88; (2000) 111 LGERA 181 at [80]). In addition, the applicant draws attention to the fact that in the s 69 Report there is some discussion of compliance with nominated SEPPs and particular directions made under s 117 of the EPA Act but no reference in that passage of the report to SEPP 19. It therefore contends that an inference should be drawn that the consideration required was not in fact given to this particular Policy.

252 In October 2008 a draft study was prepared by staff and consultants of the Council entitled "Land of High and Special Ecological Value". The study was prepared for the Panel. It was an appendix to the October 2008 Report. In paragraph 1.2, the study recognised that –

"the Council [sic] is required to consider a range of national, state and regional legislation, plans, strategies, objectives and targets in the planning for the Town Centres LEP including the following ...".

Among the instruments identified was SEPP 19. There is then identified a number of plans or studies said to be relevant to the draft Centres LEP. These include the Ku-ring-gai Sustainability Plan under which appears the description "highly value and conserve natural environment/bushland of Ku-ring-gai." Further reference is made in a table to the study to an objective expressed as –

"natural resource decisions contribute to improving or maintaining economic sustainability and social well being".

Against that objective, reference is made to the Sustainability Plan referring to a statement that "natural environment contributes to [a] sense of belonging."

- 253 The study continues by identifying the ecological values of Ku-ring-gai, indicating that the area contained "significant areas of native vegetation within public and private ownership, including 1100 hectares of bushland." The study identifies the occurrence of threatened ecological communities, within the meaning of the *Threatened Species Conservation Act 1995*, including two significant forest species. It is observed that these species generally occur within the town centre areas.
- 254 It was this study that recommended the creation of the biodiversity provision of the draft Centres LEP that I have earlier discussed in relation to the alteration issue. While, as the Minister acknowledges, the study is not one that focuses on bushland but rather on broader matters of ecology and biodiversity, its content makes clear that steps to preserve the ecology of the town centre areas and enhance biodiversity is dependent upon the planning controls that allow development potentially affecting existing vegetation. The focus upon that existing vegetation is vegetation of a kind that would appear to meet the definition of "bushland" found in SEPP 19. Ultimately, the report led to the preparation of the biodiversity map and the attribution of different areas as being either of "High Biodiversity Significance" or "Special Biodiversity Significance".
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255 I have referred to the fact that the study was an appendix to the October 2008 Report. That report itself addressed both ecological issues as well as issues of biodiversity. Under each of those topics reference to remnant vegetation and threatened species or communities of vegetation within the areas covered by the draft instrument is made. The means by which the draft instrument addresses these matters is identified.

256 Earlier I have also referred to the provisions of both the draft Centres LEP and the Centres LEP, as made, that address biodiversity. Cl 5.9 of the Centres LEP is headed "Preservation of trees or vegetation". A similar clause was contained in the exhibited draft. The objective of the clause is expressed to be "to preserve the amenity of the area through the preservation of trees and other vegetation." The clause then proceeds to impose controls upon damage to or removal of vegetation in the absence of a consent or permit from the Council.

257 It is correct to observe, as the applicant does, that other than recognise the provisions of SEPP 19 as being relevant to the preparation of the draft Centres LEP, there is no discussion in the report of cl 10. However, a consideration of the material to which I have made reference would indicate to me that, in substance, consideration to its requirements had been given. The emphasis of the material to which I have referred is directed to the importance of vegetation and vegetation communities in Ku-ring-gai, including its importance ecologically as well as for its scenic and social worth. I think these are the matters which underlie the objectives of the Policy, the existence of which was clearly brought to the attention of the Panel.

258 As was admitted on behalf of the applicant in the course of argument, cl 10 imposes no obligation to include any particular provision addressing urban bushland in a draft planning instrument. The requirement was to "have regard" to the aims of the Policy and to give priority to retaining bushland. The detailed consideration given when addressing the biodiversity maps seems to me to have necessarily reflected a consideration to retention of

bushland by adoption of the dual categories for that biodiversity. Whether it was a successful or desirable approach is not to the point. It was considered as being of importance.

259 For these reasons I would not sustain ground (iv) of the applicant's challenge.

Ground (v): validity of the s 69 Report

260 It will be recalled that the Delegation to the Panel to prepare the s 69 report for the Minister was subject to a number of conditions. One of the conditions for exercise of the function was compliance with the Guidelines. The applicant submits that there was not compliance with the Guidelines as a consequence of which the Panel had no power to submit the Report to the Minister.

261 Although not pleaded by the applicant, there is a further step to found invalidity on this ground that needs to be noticed. The power of the Minister to make the Centres LEP is found in s 70(1) of the EPA Act. The subsection is only engaged after the Minister has considered "the Director-General's report made under section 69". The applicant's argument is therefore that the report prepared by the Panel was not a report "made under section 69", as a consequence of which the Minister's power was not engaged. The purported exercise of power is, so the argument requires, invalid.

262 Before identifying the basis upon which the applicant contends that the Panel had not complied with the Guidelines, there is a matter to be noticed that was not the subject of argument. As I have earlier recorded, the Minister not only had before him the s 69 report prepared on behalf of the Panel but also a supplementary report under that section, directed to the further amendment of the draft instrument in respect of the Masada triangle at Lindfield.

263 There were two recommendations contained in that supplementary report. The first was that the Minister form the opinion that the Masada triangle amendment was of regional planning significance for the purpose of s 70(1)(a)(ii) of the EPA Act. The second recommendation was that the Minister proceed to make the Centres LEP under s 70(1)(a), the terms of which I have earlier quoted. Importantly, for present purposes is the following paragraph contained in that supplementary report:

"This supplementary section 69 report should be read in conjunction with the original section 69 report for the draft Ku-ring-gai Town Centres LEP as submitted by the Ku-ring-gai Planning Panel."

The supplementary report is signed by the Director-General.

264 It seems to me that the supplementary report signed by the Director-General can provide a complete answer to the applicant's contention, even if the Panel's report had been prepared in the absence of prior compliance with the Guidelines.

265 The Director-General was not bound by the Guidelines in preparing his report. His report did, in turn, adopt by reference, the Panel's report. Even if the latter report lacked statutory force at the time of its submission, its adoption by the Director-General in the supplementary report meant that there was a report conforming with the section which engaged the power of the Minister to make the Centres LEP under s 70(1).

266 However, as the matter was not argued by the Minister on this basis, I should turn to the basis upon which the Minister contended that the report prepared by the Panel did not suffer the defect alleged by the applicant.

267 The applicant claims that there were two respects in which the Panel failed to comply with the Guidelines. They are those identified in paragraph 2.1.3 and paragraph 2.1.4. Both paragraphs are directed to material that "must be included in the material displayed during exhibition" of a draft

local environmental plan. The purpose of the Guidelines is directed to disclosure concerning impacts on council-owned land from a proposed planning regime.

268 Paragraph 2.1.3 is headed "Anticipated development". It requires councils to provide information about the physical or operational changes that may result to council-owned land if the proposed local environmental plan is made in the form exhibited. Paragraph 2.1.4 is headed "Financial implications". It requires councils to provide information about the effect ~~any change in planning controls will have on the value of council-owned~~ land. The paragraph requires that a council "must at least provide an indication of the magnitude of any financial gains or losses."

269 Reference has been made earlier in these reasons to the documents exhibited with the Statutory Exhibition Material identifying all council-owned land and indicating, amongst other things, either maintenance of the status quo or a contemplation of reclassification with an indication in a second document of the development anticipated should reclassification of the land proceed. All but one of the sites identified in the these documents are classified as "community land" within the meaning of the *Local Government Act*. These documents were exhibited behind a statement indicating their preparation in order to comply with the Guidelines. A copy of the Guidelines document itself was also exhibited.

270 The first of the documents exhibited identified the current zoning, existing use, proposed zoning, date and method of acquisition and anticipated development. Earlier in these reasons I have referred to the manner in which the anticipated development for each allotment or parcel of land was indicated. Where no reclassification was then in contemplation it was indicated that there was "no proposed development". It seems to me that the manner in which this first Schedule was prepared accorded with the requirement of paragraph 2.1.3 of the Guidelines.

271 The critical focus of the applicant's submission is directed to the requirement of paragraph 2.1.4. The complaint, in essence, is that no indication was given of the magnitude of any financial gain or loss in the second of the two documents exhibited in purported compliance with the Guidelines. It is correct to observe that the document does not identify any particular sum as being attributable to gain or loss by dint of the proposed zoning of any Council land. The document does indicate the Council's intended use of the land in the event that it is reclassified from community land to operational land.

272 The indication of effect on value is generally given in one of three ways: that no increase in value is anticipated from the changed zoning; that it is not possible to identify any increase in value, or an acknowledgement that the value of the site would increase. Where the possibility of increase is acknowledged, the document identifies the intention of the Council in relation to the particular site being either to retain it for Council purposes or, in the event of sale, to secure the provision of services or facilities by a purchaser equal to the value of the site.

273 The requirement for disclosure of effect on value of council-owned land needs to be understood in the context of the expressed purpose of the Guidelines. Its overall purpose is directed to a perceived conflict of interest in a council seeking to implement the rezoning of land in a manner that will secure financial advantage to it. So much is indicated at the commencement of paragraph 2.1.4 which acknowledges that a change in planning controls will have some effect on land values but that "there will be instances where council or another party stands to make a substantial financial gain or loss as a result of making an LEP". It is in those circumstances that the Guideline is directed to ensuring that the community "be aware of the financial implications of a change in planning controls".

274 As I have indicated, all but one of the Council-owned parcels of land was classified as community land. In respect of land so classified the capacity

of the Council to realise the value of the land is constrained by the provisions of s 45 of the *Local Government Act*. Subsection (1) of that section provides that a council "has no power to sell, exchange or otherwise dispose of community land." The purpose of paragraph 2.1.4 is directed to disclosure where the possibility exists of "substantial financial gain or loss" consequent upon the making of the local environmental plan in question. As the Council lacked any realistic power to realise any gain or address any loss that might be occasioned by the rezoning proposed under the draft Centres LEP, the provisions of paragraph 2.1.4 had no substantive work to do in the present case.

- 275 It is only if the land is classified as operational land that the Council may deal with it in order to realise any financial gain or loss. As I have earlier indicated when addressing another ground of challenge, reclassification from community land to operational land can only be achieved by the making of a further local environmental plan. It is only when a draft local environmental plan seeking to achieve that end is drafted and exhibited that paragraph 2.1.4 of the Guidelines will have work to do. Neither the draft Centres LEP nor the Centres LEP, as made, proposed the classification or re-classification of Council-owned land.
- 276 Although not decisive of the issue, there is substance in the submission of the Minister that an air of unreality pervades a finding of non-compliance with the identified clauses of the Guidelines. Although acting as the surrogate of the Council for the purpose of preparing the draft Centres LEP, the Panel itself was not in any position of conflict of the kind sought to be addressed by the Guidelines. It did not own any of the land and did not stand to lose or gain by the manner in which Council-owned land was zoned. This unreality is emphasised when it is appreciated that the draft Centres LEP was not proposed by the Council. Indeed, it was opposed by it, as is made manifest by the submission it made to the Panel in response to the exhibition of the draft instrument.

277 For these reasons, I am not persuaded that the Panel had failed to observe the condition of the Delegation as it related to compliance with the Guidelines. As a consequence, the s 69 report submitted by it to the Minister was a report able to be considered by him conformably with s 70(1) of the EPA Act. I do not uphold this ground of challenge.

Severance

278 Should I find, as I have, that two grounds of challenge made by the applicants succeed, the Minister nonetheless submits that this is an appropriate case for severance. He submits that those parts of the Centres LEP infected by the invalidity that I find can be severed from those parts which are either unchallenged or in respect of which the applicant's challenge fails.

279 I have determined that the applicant succeeds because the Centres LEP, as made, is not the outcome of the process for making a local environmental plan required to be undertaken by the provisions of Div 4 of Pt 3 of the EPA Act. This is because the instrument as made differed in important respects from the exhibited draft instrument. Those important respects have been identified but they include the changed provisions directed to the biodiversity controls contemplated in the draft instrument. In his final written submission, the Minister acknowledged that if invalidity is found by reason of this change, then severance is not appropriate.

280 I accept that this must be so. The changed biodiversity controls involving the removal of reference to "High Biodiversity Areas" is a change that infects a large number of lots throughout each of the town centre areas. Moreover, the alterations made, in their totality, affect lands disbursed throughout the town centre areas such that if severed I could not be satisfied that the Minister would have made the Centres LEP with the ~~successfully impugned parts severed from it.~~

Costs

281 Given that the applicant has been successful in obtaining the relief that it sought, but not on all grounds that it argued, it is appropriate that I reserve the question of costs. It will be apparent that several issues upon which the applicant was unsuccessful were issues, the costs of arguing which, ought not to burden the Minister. However, this is a tentative view and it will be left to the parties to make such application as they may be advised for any costs order.

282 Any application for costs should be made by motion and filed within 7 days from the date of my orders.

Orders

283 For the reasons that I have indicated, I make the following orders:

1. Declare that *Ku-ring-gai Local Environmental Plan (Town Centres) 2010* published on the NSW legislation website on 25 May 2010 has been made contrary to the provisions of Division 4 of Part 3 of the *Environmental Planning and Assessment Act 1979* and is thereby of no legal force or effect.
2. Costs reserved.
3. Any application for costs is to be made by notice of motion filed within 7 days of today's date.
4. Exhibits may be returned.
